TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1923

No. [redacted] 126

WILLIAM HENRY PACKARD, APPELLANT,

vs.

JOAB H. BANTON, AS DISTRICT ATTORNEY IN AND FOR THE COUNTY OF NEW YORK, AND CHARLES D. NEWTON, AS ATTORNEY GENERAL FOR THE STATE OF NEW YORK.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED SEPTEMBER 22, 1923.

(29,157)

(29,157)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 607.

WILLIAM HENRY PACKARD, APPELLANT,

vs.

JOAB H. BANTON, AS DISTRICT ATTORNEY IN AND FOR THE COUNTY OF NEW YORK, AND CHARLES D. NEWTON, AS ATTORNEY GENERAL FOR THE STATE OF NEW YORK.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 16, 1922.

UNITED STATES OF AMERICA, *ss:*

o Joab H. Banton, as District Attorney in and for the County of New York, and Charles D. Newton, as Attorney General for the State of New York, Greeting:

You are hereby cited and admonished to be and appear at a Su-reme Court of the United States, at Washington, within thirty days om the date hereof, pursuant to a writ of error, filed in the Clerk's fice of the District Court of United States for the Southern District New York, wherein William Henry Packard is appellant and you e appellees, to show cause, if any there be, why the judgment ren-red against the said plaintiff in error as in the said writ of error entioned, should not be corrected, and why speedy justice should t be done to the parties in that behalf.

Witness, the Honorable William Howard Taft, Chief Justice of e United States, this Second day of August, in the year of our rd one thousand nine hundred and twenty-two.

AUGUSTUS N. HAND,
United States District Judge.

[Endorsed:] Citation. District Attorney's Office. Received 5.28 p. m., Aug. 3, 1922. Copy received. Dated, w York, Aug. 4, 1922. Joab H. Banton, District Attorney, by n. L. Kavanagh, Chief Clerk, per W. P. P.. Copy of within paper eived Aug. 3, 1922. Chas. D. Newton, Attorney General. Service his citation is hereby accepted this 3 day of August 1922.

At a Term of the United States District Court for the Southern District of New York Held on the 20th day of June, 1922.

resent: Hon. Martin T. Manton, U. S. Circuit Judge.

WILLIAM HENRY PACKARD, Plaintiff,

against

H. BANTON, District Attorney in and for the County of New ork, and Charles D. Newton, Attorney General of the State of ew York, Defendants.

reading the Bill of Complaint of William Henry Packard,

dered that the defendants do on the 23rd day of June, 1922, cause why a preliminary injunction should not issue as prayed the Bill of Complaint.

MANTON,
U. S. Circuit Judge.

dorsed: Filed June 20, 1922.

4 In the District Court of the United States for the Southern District of New York.

WILLIAM HENRY PACKARD, Plaintiff,

against

JOAB H. BANTON, District Attorney in and for the County of New York, and Charles D. Newton, Attorney General of the State of New York, Defendants.

To the Honorable the Judges of said Court, in Equity Sitting:

William Henry Packard, a citizen and resident of the State of New York and of the Southern District thereof, in behalf of himself and of all other persons similarly situated, brings this suit against Joab H. Banton, District Attorney in and for the County of New York, a citizen and resident of said State of New York and of the Southern District thereof, and Charles D. Newton, Attorney General of the State of New York, a citizen and resident of said State of New York, and complaining avers:

First. The jurisdiction of this Court is invoked under Clause "A," Subdivision 1 of Section 24 of the Federal Judicial Code, the rights of the plaintiff being predicated upon and arising under the Fourteenth Amendment to the Constitution of the United States, as will hereinafter appear, and the sum or value in controversy exceeding, exclusive of interest and costs, $3,000.00.

Second. Your orator has been and now is engaged in the taxicab business, to wit, carrying and transporting passengers upon and along public streets in Greater New York for hire, operating four cars; that he has, in all respects, complied with the provisions of the City Ordinances and the laws of the State of New York in existence regulating the business of taxicabs for hire.

Third. The General Assembly of the State of New York recently passed an Act entitled, "An Act to Amend the Highway Law, in requiring indemnity bonds or insurance policies from owners of motor vehicles transporting passengers for hire in cities of the first class," amending Chapter 30 of the Laws of 1909, which reads as follows:

Chapter 612.

An Act to Amend the Highway Law, in Requiring Indemnity Bonds or Insurance Policies from Owners of Motor Vehicles Transporting Passengers for Hire in Cities of the First Class.

5 Became a law April 13, 1922, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter thirty of the laws of nineteen hundred and nine, entitled "An act relating to highways, constituting chapter twenty-five of the consolidated laws, is hereby amended by inserting therein a new section, to be section two hundred and eighty-two *b*, to read as follows:

§ 282-*b*. Indemnity Bonds or Insurance Policies of the First Class.—Every person, firm, association or corporation, engaged in the business of carrying or transporting passengers for hire in any motor vehicle, except street cars, and motor vehicles operated under a franchise by a corporation subject to the provisions of the public service commission law over, upon or along any public street in a city of the first class shall deposit and file with the state tax commission for each motor vehicle intended to be so operated, either a personal bond, with at least two sureties approved by the state tax commission, a corporate surety bond or a policy of insurance in a solvent and responsible company authorized to do business in the state, approved by the state tax commission, in the sum of two thousand five hundred dollars, conditioned for the payment of any judgment recovered against such person, firm, association or corporation for death or for injury to persons or property caused in the operation or the defective construction of such motor vehicle. Such bond or policy of insurance shall contain a provision for a continuing liability thereunder notwithstanding any recovery thereon. If at any time, in the judgment of the state tax commission, such bond or policy is not sufficient for any cause, the commission may require the owner of such motor vehicle to replace such bond or policy with another approved by the commission. Upon the acceptance of a bond or policy, pursuant to this section, the state tax commission shall issue to the owner of such motor vehicle a certificate describing such vehicle and that the owner thereof has filed a bond, or policy, as the case may be, required by this section. Either a person or corporate surety upon a bond filed pursuant to this section or an insurance company whose policy has been so filed, may file a notice in the office of the state tax commission that upon the expiration of twenty days from such filing such surety will cease to be liable upon such bond, or in the case of such insurance company, that upon the expiration of such time such policy will be canceled. The state tax commission shall thereupon notify the owner of such motor vehicle of the filing of such notice, and unless such owner shall file a new bond or policy of an insurance company, as provided by this section, within such time as shall be specified by the state tax commission, such owner shall cease to operate or cause such motor vehicle to be operated, in such city, and the registration of such motor vehicle shall be automatically revoked. Any person, firm, association or corporation, operating a motor vehicle in a city of the first class, as to which a bond or policy of insurance is required by this section who or which shall operate such vehicle, or cause the same to be operated, while a bond or policy, approved by the state tax commission as required by this section, is not on file with the tax commission, shall be guilty of a misdemeanor.

§ 2. This act shall take effect July first, nineteen hundred and twenty-two.

Fourth. Your orator further avers that said statute imposes burdens upon your orator and other taxicab owners and operators not common to other common carriers, to wit, owners of cars using same as common carriers of goods and chattels who are not within the jurisdiction of the Public Service Commission of the State of New York, i. e., private expressmen and owners of street cars and motor vehicles operated under a franchise by a corporation, subject to the provision of the Public Service Commission Law. Your orator further charges that said statute is unconstitutional and is unequal in its operation and denies him and all other persons similarly situated the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States, and in this connection your orator avers that the classification made by the State of New York by said statute in singling out persons, firms, associations and corporations engaged in the business of carrying and transporting passengers for hire in any motor vehicle upon or along the public streets in the City of New York, and exempting therefrom owners of cars using same as common carriers of goods and chattels who are not within the jurisdiction of the Public Service Commission of the State of New York, i. e., private expressmen and street cars and motor vehicles operated under franchise by a corporation, subject to the Public Service Commission Law of the State of New York, is unreasonable, and arbitrarily discriminates in favor of a part of a class of common carriers and against another class of common carriers to which your orator belongs. Your orator further avers that no reasonable basis in fact exists for exempting street cars and motor vehicles operated under a franchise by a corporation, subject to the provision of the Public Service Commission Law, from furnishing a bond in the sum of $2,500.00, conditioned for the payment of any judgment recovered against such person, firm, association or corporation for death or injury to persons or property caused in the operation or the defective construction of such motor vehicle, for the reason many persons suffer injury and damages by reason of the negligent operation of such cars and because many street railways and others operating motor vehicles under a franchise subject to the provision of the Public Service Commission Law in the State of New York, have in recent years been unable, by reason of financial reverses or other conditions, to meet, pay and discharge lawful claims for personal injuries sustained by persons and corporations by and through the negligent operation of such cars or motor vehicles, or because of the defective construction of same; that many street railway corporations have gone into receiverships and have been operated by receivers of the respective courts, and that such receivers have not been able to meet, pay and discharge the lawful claims for personal injuries against such street railway corporations. Your orator further avers that said Act above referred to unreasonably discriminates in favor of private owners of motor vehicles and trucks used for the transportation of persons or

freight upon or along any public street in a city of the first class in the State of New York, which class of persons are exempt and are not subject to the provisions of said Act. That said Act thus exempting private owners of motor vehicles and trucks from the operation of said statute is class legislation, and confers a privilege upon such owners which is denied to the class of citizens to which your orator belongs; that no reasonable basis exists for exempting such owners from the operation of said statute for the reason that the operation of motor vehicles by private owners for pleasure or business does not involve less danger to the public using the
7 streets than the operation of motor vehicles by taxicab drivers operating cars for conveyance of passengers for hire; that the number of accidents resulting from the operation of motor vehicles by private owners operating such cars for pleasure or business is far greater than those operated by taxicab drivers; this is due to the fact that taxicab drivers are by law required to have experience and knowledge pertaining to the operation of said motor cars, and required to pass examinations as to their fitness for that purpose; that the standard of fitness demanded and required of taxicab drivers is much higher than the one exacted from owners of cars who operate same for pleasure. Your orator further avers that said Act discriminates and unreasonably imposes burdens upon persons, firms, associations or corporations engaged in the business of transporting passengers for hire in any motor vehicle upon or along the public streets of the City of New York, except street cars and motor vehicles operated under a franchise by a corporation, subject to the provision of the Public Service Commission Law, upon or along any public street in a city of the first class in the State of New York, and exempts from its operation the same class of persons engaged in the business of carrying or transporting passengers for hire in any motor vehicle in cities or villages other than first class cities in said State of New York; that the classification thus made by the State of New York is arbitrary, unreasonable and unequal in its operation and for that reason violates the Fourteenth Amendment to the Constitution of the United States, and denies to your orator and all other persons similarly situated the equal protection of the law; that for the reasons above stated said statute is also in contravention of Article 1, Section 6 of the Constitution of the State of New York.

Fifth. Your orator further avers that the income from the operation of a motor vehicle, such as a taxicab, in the City of New York, is limited by reason of the fact that a rate of fare is fixed by law and a greater rate cannot be collected; that the average net income from the operation of a single taxicab in the City of New York is about $35.00 per week; that since the passage of said Act, the insurance companies operating in the State of New York have fixed a rate of premium at $960.00 for the furnishing of a bond required under said Act, which amounts to about $18.50 per week. Accordingly, your orator avers that the practical result of the administration of said law will be to cut the income of your orator from $35.00 per week to about $16.50 per week on each car operated by him, and your orator therefore

charges that the law is confiscatory and will deprive your orator of his property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

Sixth. Your orator further avers that the defendants, as the law enforcing officers of the State of New York, intend to enforce the provisions of the said law, described in paragraph "Third" of this Bill of Complaint, and have announced that they will prosecute your orator and all other persons similarly situated if said law is not complied with, and your orator avers that he verily believes that said defendants will do so unless restrained by a Writ of Injunction duly granted by this Court.

Seventh. Your orator, therefore, being without an adequate remedy at law in the premises, respectfully prays:

First. That the said Act of the General Assembly of the State of New York, entitled "An Act to amend the Highway Law in requiring indemnity bonds or insurance policies from owners of
8 motor vehicles transporting passengers for hire in cities of the first class," which became a law April 13, 1922, be declared unconstitutional and repugnant to the Fourteenth Amendment to the Constitution of the United States.

Second. That pending the determination of this action, the defendants may be restrained and enjoined from enforcing the said Act against your orator and all other persons similarly situated, and that upon the final hearing such preliminary injunction may be made permanent.

Third. That a subpœna may duly issue requiring the defendants to appear and answer this Bill of Complaint in accordance with the rules in equity in such cases made and provided.

Fourth. And that your orator may have such other and further relief in the premises as in equity and good conscience he may be entitled to.

HOUSE, GROSSMAN & VORHAUS,
Solicitors for Plaintiff.

LOUIS J. VORHAUS,
ELIJAH N. ZOLINE,
FREDERICK HEMLEY,
Of Counsel.

STATE OF NEW YORK,
County of New York, ss:

William Henry Packard, being duly sworn, deposes and says: That he is the plaintiff in the above-entitled cause; that the foregoing Complaint by him subscribed was fully read by him and that he knows the contents thereof, and the same is true except as to the matters and things stated by him on information and belief, and as to those matters he believes same to be true.

WILLIAM H. PACKARD.

Sworn to before me this 17th day of June, 1922.
ELIZABETH L. CLARKE,
Notary Public.

New York County No. 145.
New York Registers No. 3047.
Commission Expires March 30, 1923.

9 In the District Court of the United States for the Southern District of New York.

WILLIAM HENRY PACKARD, Plaintiff,

against

JOAB H. BANTON, District Attorney in and for the County of New York, and Charles D. Newton, Attorney General of the State of New York, Defendants.

Charles D. Newton, Attorney General of the State of New York, one of the Defendants in the above entitled suit, answers and says:

I.

I admit the allegations contained in the paragraphs of Complaint numbered "First," "Second," "Third" and "Sixth."

II.

I deny the allegations contained in the paragraph of the Complaint marked "Fourth."

III.

I am without knowledge of the facts alleged in the paragraph of the complaint marked "Fifth."

10

CHARLES D. NEWTON,
Attorney General of the State of New York in Propria Persona, Office & Post Office Address The Capitol, Albany, N. Y.,
By CLAUDE T. DAWES,
EDWARD G. GRIFFIN,
Deputies Attorney General.

Charles D. Newton, being duly sworn, deposes and says: I am the Defendant above named; I have read the foregoing answer and I know the contents thereof; the same is true to my own knowledge.
CHARLES D. NEWTON.

Sworn to before me this 22nd day of June, 1922.
[SEAL.]
M. M. THOMAS,
Notary Public.

11 District Court of the United States, Southern District of New York.

In Equity.

WILLIAM HENRY PACKARD, Plaintiff,

against

JOAB H. BANTON, District Attorney in and for the County of New York, and Charles D. Newton, Attorney General of the State of New York, Defendants.

Notice of Motion.

SIRS:

Please take notice that the annexed motion to dismiss the bill of complaint herein has this day been filed in the District Court of the United States for the Southern District of New York in the office of the Clerk of the said Court and that the said motion will be set down for hearing and brought on for argument at a stated term of the said Court for the hearing of motions to be held at the Old Post Office in the City and County of New York, Southern District of New York, on the 23rd day of June 1922, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated: New York, June 21, 1922.

Yours, etc.,

JOAB H. BANTON,
District Attorney in and for the County of New York.
JOHN CALDWELL MYERS,
Solicitor for Defendant Joab H. Banton, District Attorney in and for the County of New York.

32 Franklin Street, New York, N. Y.

To House, Grossman & Vorhaus, Solicitors for Plaintiff, 115 Broadway, New York, N. Y.

Endorsed: Filed July 21, 1922.

2 District Court of the United States, Southern District of New York.

In Equity.

WILLIAM HENRY PACKARD, Plaintiff,

against

OAB H. BANTON, District Attorney in and for the County of New York, and Charles D. Newton, Attorney General of the State of New York, Defendants.

Motion to Dismiss Bill of Complaint.

Now comes the defendant, Joab H. Banton, District Attorney in nd for the County of New York, and upon the bill of complaint erein moves that the said bill of complaint be dismissed for the fol- owing reasons and upon the following grounds, to-wit:

1. That no sufficient facts are averred in the bill of complaint to ow that the matter in controversy exceeds, exclusive of interest and sts, the sum or value of $3,000.

2. That it appears upon the face of the bill of complaint that the cts stated therein are insufficient to constitute a cause of action in quity.

3. That it appears upon the face of the bill of complaint that the laintiff has a plain, adequate and complete remedy at law.

4. That it does not appear upon the face of the bill of complaint nd no sufficient facts are averred therein to show that the interven- on of a court of equity or the assumption of jurisdiction by such a court is necessary or essential in order effectually to protect 3 the property or rights of property of the complain-t from great and irreparable injury or from any injury whatsoever.

5. That Chapter 612 of the Laws of 1922 is a valid statute duly assed by the Legislature of the State of New York in the due exer- se of its lawful and constitutional powers; and it does not appear om the face of the bill of complaint or from the facts averred erein that the said statute, or the enforcement thereof by the State New York by and through its governmental and administrative gencies, operates or will operate to deprive or deny the complainant the equal protection of the laws, or to deprive him of liberty or of y property or rights of property without due process of law.

6. That it appears upon the face of the bill of complaint that to ant the relief sought by the complainant would constitute an un- wful and unconstitutional interference by the agencies of the Fed- al Government with the lawful and constitutional power, right and ty of the State of New York and its governmental agencies (in- uding the District Attorney of the County of New York) to prose- te violations of a criminal statute of the State of New York.

7. That it appears upon the face of the bill of complaint that this court is without power or authority to grant the relief or to render the judgment and decree prayed for.

8. That no sufficient facts are alleged in the bill of complaint to warrant or justify the granting of the relief prayed for or any other equitable relief.

14 Wherefore, for the reasons and upon the grounds aforesaid, the defendant, Joab H. Banton, District Attorney in and for the County of New York, respectfully moves this Court that the bill of complaint herein be dismissed as to him.

Dated: New York, June 22, 1922.

JOAB H. BANTON,
District Attorney in and for the County of New York.
JOHN CALDWELL MYERS,
Solicitor for Defendant Joab H. Banton, District Attorney in and for the County of New York.

32 Franklin Street, New York, N. Y.

Endorsed: Filed July 21, 1922.

15 In the District Court of the United States, Southern District of New York.

WILLIAM HENRY PACKARD, Plaintiff,

against

JOAB H. BANTON, District Attorney in and for the County of New York, and Charles D. Newton, Attorney General of the State of New York, Defendants.

This matter having come on to be heard on the return of the order to show cause why a preliminary injunction should not issue as prayed for in the bill of complaint, and the Court having heard the arguments of counsel and being fully advised in the premises, it is

Ordered that the motion for an injunction pendente lite be and the same hereby is denied; it is further

Ordered that the bill of complaint herein be and the same hereby is dismissed for want of equity without prejudice to filing a new bill based on the alleged unconstitutionality of operation or administration of the Statute described in the bill of complaint.

Enter.

C. M. HOUGH,
C. J.
MARTIN T. MANTON,
C. J.
AUGUSTUS N. HAND,
D. J.

July 17, 1922.

Endorsed: Filed July 21, 1922.

United States District Court, Southern District of New York.

WILLIAM HENRY PACKARD, Plaintiff,

against

B H. BANTON, District Attorney in and for the County of New ork, and Charles D. Newton, Attorney General of the State of ew York, Defendant-.

Statement of Facts under Equity Rule 75.

he above entitled cause came on to be heard before Hon. Martin Manton and Hon. Charles M. Hough, United States Circuit ges and Hon. Augustus N. Hand, United States District Judge he return of an order to show cause why a preliminary injunc- should not issue as prayed for in the bill of complaint to re- n the defendants from enforcing an act of the State of New k entitled as follows:—"An act to amend the highway law, er requiring indemnity bonds or insurance policies from own- of motor vehicles transporting passengers for hire in Cities of irst class," which became a law on April 13th 1922.

t said hearing the following papers were presented to the Court onsideration:—

he bill of complaint, the answer of the defendant Charles D. Newton, the motion of the defendant Jacob H. Banton to dismiss, and the affidavits submitted in behalf of the com- plainant, viz:—the affidavits of William Henry Packard, ied June 17, 1922, and June 22, 1922, the affidavit of Patrick evine, verified June 19, 1922, the affidavit of Genarro Pucilla, ied June 19, 1922, the affidavit of Louis Warshal, verified June 922, the affidavit of Charles C. Schwartz, verified June 21, 1922, the affidavits submitted in behalf of the defendants, viz:—the avit of Henry J. Drake, verified June 28, 1922, the affidavit of b Kendrick Upton, verified June 29, 1922, the affidavit of Wil- Cooper, verified June 29, 1922, the affidavit of William E. uirk, verified June 29, 1922; the said affidavits being in words figures as follows, to wit:—

18 In the District Court of the United States for the Southern District of New York.

WILLIAM HENRY PACKARD, Plaintiff,

against

JOAB H. BANTON, District Attorney in and for the County of New York, and Charles D. Newton, Attorney General of the State of New York, Defendants.

STATE OF NEW YORK,
County of New York, ss:

William Henry Packard, being duly sworn, deposes and says: I am a citizen of the United States and a resident of the State of New York and of the Southern District thereof.

I am the owner of four taxicabs and have been operating taxicabs for upwards of six months in the City of New York.

From my personal experience, and from the experience of others operating taxicabs in the City of New York I know that the average net income of a taxicab driver in the City of New York is not in excess of $35 per week, and in many instances it is considerably less than $35 net per week.

I know of my knowledge that all the Insurance Companies doing business in the City of New York have fixed $960 per year as the premium for a $2,500 bond as required by the law recently enacted and which law becomes operative on the 1st day of July next. This premium is at the rate of approximately $18.50 per week.

With a net income not in excess of $35 per week, and with an obligation to pay approximately $18.50 per week for the insurance, the net amount in the hands of the taxicab driver would not be in excess of $16.50 per week.

As a matter of fact, most taxicab owners do not own their cars outright, but purchase their cars subject to a chattel mortgage requiring the payment of a certain amount per month. In most instances the amount paid on account of the chattel mortgage is $100 per month, plus interest. It is therefore evident that the taxicab driver will not have sufficient money out of his income from his occupation with which to pay the mortgage nor will any money be left from which he and his family may live. A vast majority of the taxicab drivers are married men and have families to support and the additional burden required by the payment of the premium will make it impossible for the taxicab driver to continue in his present calling.

It is to be borne in mind that the rate that the taxicab driver may charge is fixed by law and at the present time the various taxicab drivers do not charge the full rate allowed by law, for the reason that the public would not patronize the taxicabs if the full rate were charged, so that there is no possibility of securing an additional income by charging a greater rate.

A tabulation from the records furnished by the Medical Department of the City of New York was made showing the number of deaths attributable to accidents in the years 1918 and 1919 in the City of New York. Annexed hereto and made a part hereof is a copy of such tabulation.

19 It will be noted that the total number of deaths attributable to automobile accidents in the City of New York for the year 1918 was 652; of this number 14 are attributable to accidents in which taxicabs figure and 467 are attributable to automobiles other than taxicabs, including private cars, and 171 are attributable to auto trucks, and for the year 1919 the total number of deaths in the City of New York attributable to automobile accidents is 702, and of this number 23 are attributable to accidents in which taxicabs figure and 424 are attributable to automobiles other than taxicabs, including private cars, and 255 to commercial autos. While I did not prepare these statistics myself, I know from my own knowledge and experience that these figures are correct.

I mention these facts merely to show that the taxicab driver is far more competent and far more careful in the operation of his car than is the ordinary private owner.

WILLIAM H. PACKARD.

Sworn to before me this 17th day of June, 1922.

ELIZABETH L. CLARKE,
Notary Public, New York County, No. 145.

New York Register's No. 3047.
Commission Expires March 30, 1923.

1918.

Deaths.

	Man.	Brk.	Bronx.	Queens.	Rich.	Total.
Taxis	12	1	11	..	..	14
Automobiles, incl. private cars	237	119	50	31	6	467
Auto truck	97	47	17	9	1	171
Horse drawn vehicles	43	23	5	1	..	72
Street cars	54	32	9	4	1	100
El. & Subway (incl. B. R. T. wreck)	23	17+95	8	1	..	49+95
	95	112	..	..	..	144
L. R. Trains	10	10	17	31	11	79
Motorcycles	1	3	1	..	..	5
Bicycles	3	3	2	..	..	8
Fifth Ave. Bus	5	..	..	..	..	5
Runaway Horse	1	1	1	..	..	3
Coasting	3	6	1	..	1	11

1919.

	Man.	Brk.	Bronx.	Queens.	Rich.	Total.
Taxis	21	2	..	..	..	23
Automobiles (incl. private)	199	147	37	25	16	424
Commercial autos	156	67	23	6	3	255
Horse drawn veh.	34	19	5	8	5	63
Street Cars	29	39	7	8	3	86
El. & Subway	29	25	10	3	..	67
R. R. trains	16	6	6	15	5	48
Fifth Ave. Bus	1	..	..	..	..	1
Motorcycle	4	2	..	..	..	6
Bicycle	3	1	..	..	..	4
Runaway Horse	2	1	..	..	..	3
Tractor Engines	..	..	..	..	1	1
Push Cart	1	..	..	..	..	1

20 In the District Court of the United States for the Southern District of New York.

WILLIAM HENRY PACKARD, Plaintiff,

against

JOAB H. BANTON, District Attorney in and for the County of New York, and Charles D. Newton, Attorney General of the State of New York, Defendants.

STATE OF NEW YORK,
County of New York, ss:

Patrick J. Devine, being duly sworn, deposes and says: That I reside at No. 147 East 97th Street, in the Borough of Manhattan, City of New York. I am married and have a wife and three children.

I have been the owner and driver of a taxicab for about eleven years past, and for the last two years my net income has not exceeded $30 per week, and frequently was considerably less. In order to make this amount it was necessary for me to work on the average of 12 to 14 hours a day.

There are upwards of 15,000 taxicab owners in the same position that I am in in the City of New York. Most of them are married men and have families dependent upon them.

I have made inquiries from the Insurance Companies in the City of New York and I know of my own knowledge that the premium that they are asking for the bond in accordance with the law recently enacted is $960 per year, which is approximately $18.50 per week. It will not be possible for me or others similarly situated to pay a premium of that kind from the income that I and others

have been deriving from the operation of taxicabs and there will be no alternative but to give up that calling. However, I will be extremely handicapped in giving up this calling, for I really have no other, having followed the taxicab business for upwards of twelve years.

I have made inquiries amongst my friends in the hope of being able to get a private bond, as permitted by the statute, and I find that it will be impossible for me to get any individuals who are either willing or able to go on any private bond, such as is demanded by the statute, and I also know from conversations with other taxicab owners that they also will find it impossible to get private bondsmen.

It is a matter of common knowledge that there are thousands of of automobile trucks doing a private trucking business in the City of New York, being common carriers from one point to another in the City of New York and from the City of New York to other points, and these individuals will not be compelled to give any bond in accordance with the requirements of the statute. It is a matter of common knowledge that these private common carriers have in the past had a great many more accidents than taxicab drivers have had.

PATRICK J. DEVINE.

Sworn to before me this 19th day of June, 1922.

MORRIS SCHNEIDER,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

1 In the District Court of the United States for the Southern District of New York.

WILLIAM HENRY PACKARD, Plaintiff,

against

OAB H. BANTON, District Attorney in and for the County of New York, and Charles D. Newton, Attorney General of the State of New York, Defendants.

TATE OF NEW YORK,
County of New York, ss:

Gennaro Pucilla, being duly sworn, deposes and says:

That I reside at #2307 Tiebout Avenue, in the Borough of the ronx, City of New York. I am married and have a wife and ild.

I have been the owner and driver of a taxicab for about six years, d for the past two years my net income has not exceeded $30 per ek, and frequently was less than $30 a week net. In order to ake this amount it was necessary for me to work from ten to fifteen urs per day.

If I am compelled to pay a premium at the rate of $18.50 per week —the amount that the Insurance Companies are asking—it will be impossible for me to make both ends meet. It will be practically impossible for me to go into another calling, because I have been driving a taxicab for upwards of six years and really have no other calling.

I have tried amongst my friends to secure some individuals who would be willing and able to go on my bond so as to avoid the necessity of having any insurance company bond, but I find that I have no friends who have sufficient money to qualify as bondsmen.

There are thousands of automobile trucks doing a private express business in the City of New York, being common carriers of personal property from one point to another in the City of New York and from the City of New York to other points, and as I understand it, these private expressmen will not be required to file a bond, although their trucks are quite as capable of doing injury to person and property as is our light taxicab, and, as a matter of fact, I know of my own knowledge that far more accidents are attributable to the automobile truck than are attributable to the taxicab.

GENNARO PUCILLA.

Sworn to before me this 19th day of June, 1922.

DAVID L. KLEIN,
Notary Public, N. Y. Co., No. 21.

22 In the District Court of the United States for the Southern District of New York.

WILLIAM HENRY PACKARD, Plaintiff,

against

JOAB H. BANTON, District Attorney in and for the County of New York, and Charles D. Newton, Attorney General of the State of New York, Defendants.

STATE OF NEW YORK,
County of New York, ss:

Morris Pollock, being duly sworn, deposes and says: that I reside at #709 East 9th Street, in the Borough of Manhattan, City of New York. I am married and have a wife and child. I have been the owner and driver of a taxicab for about seven years past, and for the last two years my net income has not exceeded Twenty Dollars per week.

In order to get this amount it was necessary for me to work from about 6.00 in the morning to about 9.00 o'clock at night, and I know of my own knowledge that there are thousands of taxicab owners who are in the same position that I am in. With a net income not in excess of Twenty Dollars per week, it will be impossible for me to pay a premium of $18.50 for insurance, and this is the

amount the insurance Companies are asking for the bond as required by the law recently enacted.

I have no other calling, and I do not know what I can turn to in the event that I cannot make a living as a taxi driver.

It will be impossible for me to secure a private bondsman, for I have no friends who have sufficient money to qualify as such private bondsman.

It seems unfair that I should be compelled to give a bond when there are thousands of automobile trucks on the streets doing a private express business and carrying personal property from one point in the City of New York to another point in the City of New York, and these individuals will not be compelled to give a bond, although it is a matter of common knowledge that far more accidents are due to automobile trucks than to taxicabs.

MORRIS POLLOCK.

Sworn to before me this 19th day of June, 1922.

DAVID L. KLEIN,
Notary Public, N. Y. Co., No. 21.

23 In the District Court of the United States for the Southern District of New York.

WILLIAM HENRY PACKARD, Plaintiff,

against

JOAB H. BANTON, District Attorney in and for the County of New York, and Charles D. Newton, Attorney General of the State of New York, Defendants.

STATE OF NEW YORK,
County of New York, ss:

Louis Warshaw, being duly sworn, deposes and says: I reside at No. 52 West 114th Street, in the Borough of Manhattan, City of New York. I am a married man. I have been the owner and driver of a taxicab for the past seven years and for the past two years my net income has averaged from twenty-five to thirty dollars per week. In order to make this amount it was necessary for me to work about from ten to twelve hours per day.

I know of my own knowledge that there are thousands of taxi owners in the City of New York who are in practically the same position that I am in. I know from inquiries made that Insurance companies are asking $960.00 per year for the premium for the bond required by law and I know that it will be impossible for me and for others situated similarly to pay any such rate for insurance.

I have attempted to secure private bondsmen, but I find that it will be impossible for me to get anyone who will be able to qualify for the amount required. In the circumstances there will be nothing that I can do but go into some other calling, and just what other calling I

can go to I cannot now figure out, because I know of nothing but the taxicab business.

I know of my own knowledge that there are a great number of private automobile trucks that do a private expressing business in the City of New York. These automobile trucks carry personal property from one point in the City of New York to another point in the City of New York and elsewhere, and under the law now enacted it will not be necessary for these private expressmen to carry any insurance, although I know of my own knowledge that these private expressmen have had a great many more accidents than have had taxi drivers.

LOUIS WARSHAW.

Sworn to before me this 19th day of June, 1922.

DAVID L. KLEIN,
Notary Public, N. Y. Co., No. 21.

[Endorsed:] In the United States District Court for the Southern District of New York. William Henry Packard, Plaintiff against Joab H. Banton, District Attorney in and for the County of New York, and Charles D. Newton, Attorney General of the State of New York, Defendants. Bill of complaint, order to show cause and affidavits. House, Grossman & Vorhaus, Attorneys for Plaintiff, 115 Broadway, Borough of Manhattan, New York City.

24 In the District Court of the United States for the Southern District of New York.

WILLIAM HENRY PACKARD, Plaintiff,

against

JOAB H. BANTON, District Attorney in and for the County of New York, and Charles D. Newton, Attorney General of the State of New York, Defendants.

CITY, COUNTY, AND STATE OF NEW YORK, *ss:*

Charles C. Schwartz, being duly sworn, deposes and says:

I am a citizen of the United States and a resident of the State of New York. I am an attorney and counselor at law duly admitted to practice in the State of New York and also in the District Court of the United States for the Southern District of New York, and am associated with the firm of House, Gossman & Vorhaus, solicitors for the plaintiff herein.

On the 20th day of June, 1922, between the hours of 12.15 P. M. and 4 P. M. I went to the office of the Chief Medical Examiner of the City of New York, room 257 in the Municipal Building, Borough of Manhattan, City of New York, and there made a transcript of the official records of the Chief Medical Examiner, showing the deaths attributable to accidents upon the streets and highways of the City of New York during the years 1920 and 1921.

Annexed hereto is an accurate tabulation of the said records of the Medicial Department of the City of New York.

CHARLES C. SCHWARTZ.

Sworn to before me this 21st day of June, 1922.

[SEAL.]

DAVID L. KLEIN,
Notary Public, N. Y. Co., No. 21.

5 1920.

Deaths.

	Man.	Bklyn.	Bronx.	Queens.	Rich.	Total.
Taxis	22	2	2	..	..	26
Automobiles (including private cars)	203	125	35	28	12	403
Auto Trucks	138	83	26	10	4	261
Horse-drawn Vehicles	24	9	..	1	..	34
Street Cars	25	32	6	6	..	69
El. & Subway	21	11	5	2	..	39
R. R. Trains	8	9	3	15	12	47
Motorcycles	..	2	1	2	..	5
Tractor	..	..	..	..	1	1
5th Ave. Bus	3	..	..	..	..	3
Runaway Horse	1	..	..	..	1	2
Through collisions as follows:						
Autos	2	8	1	6	2	19
Auto Trucks	..	1	..	..	1	1
Auto & Street Car	2	3	..	1	2	8
Auto & Horse-drawn Vehicle	2	..	1	..	..	3
Auto & B. R. T. Train	1	..	..	..	..	1
Auto & Elevated Pillar	1	..	..	..	..	1
Auto & Tree	1	1	2	..	..	4
Auto & Motorcycle	1	1	..	1	..	3
Auto & Pole	..	1	1	2	..	4
Auto & Trolley Pole	..	1	2	..	..	3
Auto & Bicycle	..	7	..	..	2	9
Auto Truck & Bicycle	..	2	..	..	..	2
Auto Truck & Motorcycle	..	1	..	..	..	1
Auto Truck & Street Car	..	1	..	..	..	1
Motorcycles	..	..	1	..	..	1
Street Car & Horse-drawn Vehicles	3	1	1	..	..	5
Auto & Fence	..	..	1	..	..	1

1921.

Deaths.

	Man.	Bklyn.	Bronx.	Queens.	Rich.	Tota
Taxis	39	6	6	..	2	53
Automobile (including private cars)	216	171	47	37	7	478
Auto Trucks	154	60	37	2	2	255
Horse-drawn Vehicles	22	17	4	3	1	47
Street Cars	31	30	8	4	2	75
El. & Subway	22	10	3	..	..	35
R. R. Trains	8	9	2	15	5	39
Motorcycles	1	3	..	..	..	4
5th Ave. Bus	1	..	..	..	..	1
Bicycles	..	4	..	..	..	4
Through collisions as follows:						
Autos	7	7	7	11	1	33
Auto & Horse-drawn Vehicle	3	1	..	1	..	5
Auto & Street Car	2	3	..	..	..	5
Auto & Tree	..	..	3	..	..	3
Auto & El. Pillars	3	2	..	..	..	5
Auto & Bicycle	6	7	1	4	1	19
Auto & Motorcycle	..	..	2	1	..	3
Auto & Concrete Mixer	..	..	1	..	..	1
Auto & R. R. Train	..	..	..	1	1	2
Motorcycle & Pole	..	1	1	..	1	3
Motorcycle & Post	1	..	..	..	..	1
Motorcycle & Elevator Pillar	..	..	1	..	..	1
Horse-drawn Vehicles	2	..	..	..	..	2
Horse-drawn Vehicles & Tree	..	..	1	..	..	1

[Endorsed:] In the United States District Court for the Southe District of New York. William Henry Packard, Plaintiff, again Joab H. Banton, District Attorney in and for the County of Ne York, and Charles D. Newton, Attorney General of the State of Ne York, Defendants, Additional Affidavit in Support of Motio House, Grossman & Vorhaus, Attorneys for Plaintiff, 115 Broa way, Borough of Manhattan, New York City.

26 In the District Court of the United States for the Southern District of New York.

WILLIAM HENRY PACKARD, Plaintiff,

against

JOAB H. BANTON, District Attorney in and for the County of New York, and Charles D. Newton, Attorney General of the State of New York, Defendants.

STATE OF NEW YORK,
County of New York, ss:

William Henry Packard, being duly sworn, deposes and says: That I am the plaintiff in the above entitled matter.

That the four cars referred to in the Bill of Complaint, owned by me, cost me $11,200, and are worth that sum to me providing I can continue in the business of operating taxicabs, but if for any reason I shall be unable to continue in the business of operating taxicabs, I would not be in a position to realize more than fifty per cent of the cost thereof to me.

I have inquired amongst my relatives and friends for the purpose of ascertaining whether it would be possible for me to get individuals to go on private bonds for me, so as to avoid the necessity of having any Insurance Company bonds, but I have neither friends nor relatives who would be able and willing to qualify as individual bondsmen. Therefore, if the law is upheld, I will be compelled to secure Insurance Company bonds, or else go out of business. It would cost $960 per year per car, which means an expense or $3,840 per year to me. In other words I am faced with this situation, that either I must pay $3,840 per year for insurance or else I must sacrifice my business and the good-will thereof—which good-will I value in excess of $5,000—and at the same time I would be compelled to sacrifice the four cars at a loss to me in excess of $5,000 on the cars, making a loss to me in toto in excess of $10,000.

On the other hand, if I were to operate my taxicabs without securing bonds, and if the law were held to be constitutional, I would be liable as a misdemeanant, and I am informed that the maximum penalty for a misdemeanor is imprisonment for one year or a fine of $500, or both, so that if I were to operate my four cars, I would be liable for each operation in sums aggregating $2,000.

WM. H. PACKARD.

Sworn to before me this 22d day of June, 1922.

MORRIS SCHNEIDER,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

[Endorsed:] In the United States District Court for the Southern District of New York. William Henry Packard, Plaintiff, against

Joab H. Banton, District Attorney in and for the County of New York, and Charles D. Newton, Attorney General of the State of New York, Defendants. Additional Affidavits. House, Grossman & Vorhaus, Attorneys for Plaintiff, 115 Broadway, Borough of Manhattan, New York City.

27 In the District Court of the United States for the Southern District of New York.

WILLIAM HENRY PACKARD, Plaintiff,

against

JOAB H. BANTON, District Attorney in and for the County of New York, and Charles D. Newton, Attorney-General of the State of New York, Defendants.

STATE OF NEW YORK,
County of Albany, ss:

Hervey J. Drake, being duly sworn, deposes and says: That he is Counsel for the Insurance Department of the State of New York, and as such state officer is familiar with the matters in said office which pertain to bonds and policies of insurance required by Chapter 612 of the laws of 1922, the statute which requires persons engaged in the business of transporting passengers for hire in cities of the first class to furnish either a personal bond, a surety company bond or a policy of insurance in the amount of $2,500 conditioned to pay damages obtained against the person in such business for death, personal injuries or damage to property occurring in the operation of motor vehicles used in said business.

Upon information and belief, that before the enactment of this law extended public agitation had arisen over the fact that owners of public conveyance of this character, and especially those engaged in the taxicab business, were financially irresponsible and unable
28 to meet judgments obtained against them arising out of the negligent operation of such motor vehicles in congested cities, that is to say, in cities of the first class.

That such a condition was a matter of common knowledge. Motor vehicles of this character, owing to their constant operation throughout most of the twenty-four hours, were peculiarly more subject to accidents than privately owned cars which did not use the streets so frequently or conduct a business for gain upon the public thoroughfares.

That from the records in the office of the Police Commissioner of the City of New York it appears that during the year 1921 persons killed by taxicabs totaled 60, while 1,996 persons were injured by taxicabs. Theretofore the Additional Grand Jury for the County of New York in the August Term 1920 had made a Presentment to the Court of General Sessions of the Peace in the County of New York (which Presentment was signed also by Richard E. Enright, Police Commissioner, Judges Otto Rosalsky, Morris Koenig and C. Carin,

Judges of the General Sessions) calling the Court's attention to the loss of life and property occasioned by motor vehicle operation on the streets of New York City (a copy of which Presentment is hereto attached) and recommending that persons or corporations engaged in the business of transporting persons for hire should be required to file a bond to pay damages resultant from careless operation. Witnesses before the Grand Jury included Chief Magistrate William McAdoo, Magistrate Frederick B. House, Magistrate W. Bruce Cobb, John Gilchrist, Commission- of Licenses of the City of New York, John Drenan, in charge of Division of Licensing Vehicles of the License Department of the City of New York, Francis Hugo, Secretary of the State of New York, and Police Commissioner Richard
29 E. Enright, Chief City Magistrate William McAdoo for a long time previous had recommended a statute of this nature, and observations of the following nature had been frequently made by him:

"The husband of a very worthy woman—mother of seven little children—was run over and killed by the culpable negligence of a driver running a motor car of which he was the owner. There is no doubt whatsoever of his guilt and I have sent the case to the Grand Jury. The widow has sued him for damages, but it appears that aside from the mortgaged car he has practically no property. There are thousands of such pitiful cases and they happen here frequently. If this man had been compelled to give a bond this woman would be assured of some recompense. As it is now, she and her helpless little family are left to the charity of friends. I know among my own friends not a few who have been severely and permanently injured by criminally reckless drivers, but so far as compensation is concerned their cases are hopeless, by reason of the fact that the drivers and owners of these vehicles are in a financial way utterly irresponsible."

While I have been unable to ascertain the number of unpaid judgments in cities of the first-class against owners of motor vehicles transporting for hire, it has been stated by Hon. Victor R. Kaufman who introduced the bill in the Assembly, that statistics would show as many as 12,000 unpaid judgments in the City of New York for negligence against persons in the taxicab business. That since the enactment of Chapter 612 of the Laws of 1922, requiring the bond or policy of insurance from persons in the business of transporting passengers, there has been filed as required by law in the office of the State Department of Insurance by the Towner Rating Bureau a schedule of rates for corporations issuing surety bonds. This schedule shows that taxicabs can obtain coverage for as low a premium as $5.00 a car per month ranging up to $25.00 per month depending upon whether collateral is deposited with the surety company, as follows:

TABLE I.

Collateral and Premiums.

Schedule for Individual Cars and Owners Operating 1 to 19 Taxicabs.

Initial collateral deposit per car.	Surety carries.	Monthly premium per car.	
$2,500	$0	$5.00	
2,000	500	10.00	
1,500	1,000	12.50	
1,000	1,500	15.00	
750	1,750	17.50	
500	2,000	20.00	
250	2,250	22.50	
0	2,500	25.00	plus $20.00 per month regarded as collateral. Total $45.00 per month.

On fleets of ten or more this rate applies to minimum collateral of $2,500 for fleet; less than ten, $250 per car.

The surety companies, I am informed by letter, have already quoted a rate of $5.87½ per cab per month, less 10%, to a group of 1,500 cabs.

The above figures are in contrast to the $960 per year per car for taxicabs to be charged by the stock liability insurance companies for a policy of insurance, as indicated by a schedule of rates filed
31 with the State Department of Insurance by the National Bureau of Casualty and Surety Underwriters. The policy of insurance to be used by the stock companies, however, includes accidents occurring anywhere in the State, which is not necessary under the law. Mutual casualty insurance companies will charge $540 a year for a policy of insurance for taxicabs.

The foregoing rates as approved by the Superintendent of Insurance are based on what experience was available, mostly from cities outside New York State, and it is hoped are higher than future experience will disclose to be necessary.

Whatever the cost of compliance is, there is always the personal bond which costs nothing, and I am informed by the State Tax Commission that upwards of 1,000 cars have already taken steps to furnish personal sureties.

Deponent believes that an injunction ought not to issue. That by a recent statute of this State (Chapter 660 of 1922, Sec. 141*b* of the Insurance Law) any insurance rates as fixed or approved by the Superintendent of Insurance may be reviewed by certiorari in our State courts, and if excessive or unreasonable may be adjusted by the court. The statute provides:

"It shall be the duty of the superintendent of insurance after due notice and a hearing before him, to order an adjustment of the rates on any risks or class of risks whenever it shall be found by him that such rates will produce an excessive, inadequate or unreasonable profit.

The findings, determinations and orders of the superintendent of insurance shall be subject to review on the merits by certiorari order in the supreme and appellate courts of this state. In the
32 event of final determination against any insurer, any overcharge during the pendency of such proceedings shall be refunded with interest on demand to the persons entitled thereto."

HERVEY J. DRAKE.

Sworn to before me this 28th day of June, 1922.
[SEAL.]
CHARLES S. CRIPPEN,
Notary Public, Albany County.

33

MS:MC. 8/4/22.

To the Honorable John F. McIntyre, Judge of the Court of General Sessions of the Peace in and for the County of New York.

SIR:

The additional Grand Jury of the County of New York for the August, 1920, Term, desires respectfully to make the following report to the Court in the matter of its investigation of the violation of the Highway Law of New York by drivers of motor vehicles;

In Your Honor's charge to this Grand Jury you called attention to the violation by drivers of motor vehicles of the laws of this state and the ordinances of the city and of the utter disregard of the law by such drivers amounting to a menace to the public of this county. The Grand Jury, pursuant to your Honor's direction, took up this matter and has devoted considerable time to the investigation of conditions in the City of New York resulting in the loss of many lives and the injury to persons by drivers of motor vehicles due to the reckless driving of chauffeurs and operators of motor driven vehicles. Witnesses were called before the Grand Jury and testimony and full and free expression of views on these conditions existing in this city were had from Chief Magistrate William McAdoo, Magistrate Frederick B. House, Magistrate W. Bruce Cobb, John Gilchrist, Commissioner of Licenses of the City of New York, John Drenan, in charge of Division of Licensing Vehicles of the License Department of the City of New York, Francis Hugo, Secretary of the State of New York, and Police Commissioner Richard E. Enright.

In addition, many members of the Grand Jury have personally attended in the Traffice Court and observed conditions existing there.

From these sources much information and data were obtained, and as a result thereof the Grand Jury begs leave to submit to this Court the following presentment:

It is recommended that all persons or corporations engaged in carrying passengers for hire or in the transportation of merchandise in any motor vehicle should be required to file a bond in the sum of $5,000 to pay any damages that might result from the careless or reckless driving of chauffeurs. Passage of such a law, if carried into effect, would help to provide a safeguard against the careless and reckless operation of motor vehicles and act as a deterrent for inefficient drivers upon our highways, and the amendment of the Motor Vehicles Law in this respect covering these suggestions of the Secretary of State is recommended by this Grand Jury, as it feels that while the filing of such a bond on the cases of financially — owners of vehicles would entail no additional burden on them, many financially irresponsible owners of taxicabs plying upon the public highways frequently injure persons who cannot be compensated in money damages for the injuries they have thus sustained. If such a chauffeur or driver were required to file a bond, even though the number of accidents might not be decreased, at least pedestrians who are injured by such financially irresponsible drivers would be able to receive some compensation for the injuries and accidents to which they have thus been subjected.

Dated, New York, October 28th, 1920.

In addition to Grand Jury signed by following:

RICHARD E. ENRIGHT,
Police Commissioner.
OTTO ROSALSKY,
MORRIS KOENIG,
C. CRAIN,
Judges General Session.

35 In the District Court of the United States for the Southern District of New York.

WILLIAM HENRY PACKARD, Plaintiff,

against

JOAB H. BANTON, District Attorney in and for the County of New York, and Charles D. Newton, Attorney-General of the State of New York, Defendants.

STATE OF NEW YORK,
City and County of New York, ss:

Jacob Kendrick Upton, being duly sworn, deposes and says: That I reside at Montclair, New Jersey and I am engaged in the insurance business at 27 William Street, New York City. During the past nineteen years, I have been engaged in the insurance business, specializing to a great extent in liability and property damage insurance on automobiles of all classes. For four years I was associated with the Ocean Accident & Guarantee Corporation, Ltd., holding

various positions, including the managership of their New York Department, in which position I had complete charge of the underwriting of all New York automobile insurance, written by that company. For three years I was associated in an executive capacity with the New York General Agency of the Continental Casualty Company of Chicago, Illinois and supervised the underwriting of all automobile insurance written by that company in this territory.

At the present time I am Vice President and General Manager of the World Mutual Automobile Casualty Insurance Com-
36 pany, Inc., operating in the City and throughout the State of New York. I am the executive head of that corporation in all underwriting and loss adjustments.

This company up to the present time has insured more cars coming within the purview of the new Highway Law than all other companies combined.

From investigation which has been necessary for me to make in connection with my business, I am satisfied that at least sixty to sixty-five per cent of the automobiles, other than taxicabs, operating in New York City, carry liability insurance; of the taxicabs operatin New York City, not more than five per cent carry any liability insurance whatsoever; that there are operating in New York about 325,000 automobiles other than taxicabs and about 13,000 taxicabs; that during the year 1921, according to the figures of the Police Department of the City of New York that I have examined, there were killed and injured by automobiles other than taxicabs in the City of New York 15,564 persons, being a ratio of one to twenty-two, that according to the same figures, there were killed and injured by taxicabs within the city of New York in the year 1921, 2,056 persons, being ratio of one to six.

I have read the Bill of Complaint herein in the Affidavit of the Plaintiff verified the 17th day of June, 1922. During the past week I have investigated the circumstances under which the Plaintiff conducts his business and have made inquiries as to the average earnings of taxicab operators in the city of New York. My investigation satisfies me that such average net earnings are at least $50.00 (Fifty Dollars) per week. I also learned that the Plaintiff's profit
37 of $35.00 per week of cab is the net profit retained by him after the payment of operation and maintenance charges, wages to chauffeurs, which wages are between Forty and Fifty Dollars ($40-50) per week.

That the rate being charged by all Mutual Automobile Insurance Companies for the insurance required by Chapter 612, the Laws of 1922, is Five Hundred Forty Dollars ($540.00) or Ten Dollars 40/100 ($10.40) per week.

JACOB KENDRICK UPTON.

Sworn to before me this 29th day of June, 1922.
[Seal Phyllis Sumter.] PHYLLIS SUMTER,
Commissioner of Deeds, New York County, No. 139.

Register's No. 23671.
My Commission expires March 1, 1928.

38 In the District Court of the United States for the Southern District of New York.

WILLIAM HENRY PACKARD, Plaintiff,

against

JOAB H. BANTON, District Attorney in and for the County of New York, and Charles D. Newton, Attorney-General of the State of New York, Defendants.

STATE OF NEW YORK,
City and County of Albany, ss:

William Cooper, being duly sworn, deposes and says: I reside at 536 East 5th Street, in the City of New York, and I am thirty-one years of age. I drive my own taxicab and operate throughout the City of New York and have done so for the past five years. My average earnings for the past three months have been $100.00 per week, including tips. It costs me $35.00 per week to operate and maintain my taxicab, including depreciation. Of the $35.00 of expense per week, $10.00 is depreciation on a new Dodge bought last March. The greater number of taxicab operators use second-hand cars on which the depreciation has been absorbed.

The Ordinances of the City of New York permit a charge of 30¢ for the first half mile or any fraction thereof for not more than two persons, and 40¢ for three or more passengers; 10¢ is allowed for each succeeding quarter of a mile or fraction thereof for two passengers, and 10¢ for every succeeding sixth of a mile for three persons.

For each piece of luggage carried outside, excepting hand-
39 bags and suit cases, 20¢ is charged. The waiting time allowed under the Ordinance is $1.50 per hour. However, three-quarters of the taxicab drivers do not charge the maximum amount permitted by the City Ordinances, but charge only 40¢ for the first whole mile and 30¢ for each additional mile. In our business the average charge for a ride is between 60¢ and 70¢.

WILLIAM COOPER.

Sworn to before me this day of 27th — 1922.

PHYLLIS SUMTER,
Commissioner of Deeds, New York County, No. 139.

Register's No. 23671.
My Commission expires March 1, 1928.
Notary Public.

40 In the District Court of the United States for the Southern District of New York.

WILLIAM HENRY PACKARD, Plaintiff,

against

JOAB H. BANTON, District Attorney in and for the County of New York, and Charles D. Newton, Attorney-General of the State of New York, Defendants.

STATE OF NEW YORK,
City and County of New York, ss:

William E. McGuirk, being duly sworn, deposes and says: "I reside at 26 DeKoven Court, Borough of Brooklyn, City of New York. I am Treasurer and General Manager of the American Yellow Taxi Operators, Inc. owning and operating 303 taxicabs made by the same manufacturer as those operated by the plaintiff and costing within $150 of the same as his.

"I have been engaged in the manufacture and sale of taximeters, the sale of taxicabs and their operation over 15 years in the City of New York.

"I have read the bill of complaint and the supporting affidavits of the plaintiff. I know that the plaintiff operates what is known as 'Green Flag Taxis' and does not charge the maximum rate permitted by ordinance.

41 "I am of the opinion, from my general knowledge of the operations of taxicabs in the City of New York, that the average gross earnings upon a taxicab well managed in the City of New York over a period of twelve months is not less than $210 per week, operated 20 hours per day by two drivers. It is the general custom to double shift the cabs. The average net profit over the same period from each cab is not less than $60 per week."

WILLIAM E. McGUIRK.

Sworn to before me this 29th day of June, 1922.

[Notarial Seal.] MAZIE E. WOCKTELL,
Notary Public, New York County.

New York Register's No. 4035.
Commission Expires March 30, 1924.

42 This was all the evidence introduced by the respective parties in support and in opposition to the motion for preliminary injunction in the above entitled cause.

The foregoing statement of facts is in all respects hereby approved and settled.

Done in open Court this 15 day of August, 1922.

CHARLES M. HOUGH,
U. S. Circuit Judge.

43 United States District Court, Southern District of New York

WILLIAM HENRY PACKARD, Plaintiff,

against

JOAB H. BANTON, District Attorney in and for the County of New York, and Charles D. Newton, Attorney-General of the State of New York, Defendants.

It is hereby stipulated and agreed that the foregoing statement is in all respects correct and it is consented that the same be approved and settled.

August 9th, 1922.

HOUSE, GROSSMAN & VORHAUS,
Attorney- for Plaintiff.
JOHN CALDWELL MYERS,
Attorney for Defendant Joab H. Banton.
EDWARD G. GRIFFIN,
Attorney for Defendant Charles D. Newton,
Deputy Attorney General.

A. U.

Endorsed: Filed Aug. 16, 1922.

44 United States District Court for the Southern District of New York.

WILLIAM HENRY PACKARD, Complainant,

vs.

JOAB H. BANTON, District Attorney in and for the County of New York, and Charles D. Newton, Attorney-General for the State of New York, Defendants.

Petition for Appeal.

To the Honorable Judge of the said Court:

And now comes William H. Packard, complainant, by House, Grossman & Vorhaus, Esqs., his attorneys, and feeling himself aggrieved by the final decree of this court, entered on the 22 day of July, 1922, hereby prays that an appeal may be allowed to him from the said decree of the Supreme Court of the United States, and in connection with this petition, the petitioner herewith presents his assignment of errors.

HOUSE, GROSSMAN & VORHAUS,
Attorneys for Complainant.

Endorsed: Filed Aug. 3, 1922.

45 United States District Court for the Southern District of New York.

WILLIAM HENRY PACKARD, Complainant,

vs.

JOAB H. BANTON, District Attorney in and for the County of New York, and Charles D. Newton, Attorney-General for the State of New York, Defendants.

Assignment of Errors.

Now comes the appellant, William H. Packard, by House, Grossman & Vorhaus, Esqs., his attorneys, and in connection with his petition for appeal says that in the record, proceedings and in the final decree aforesaid, manifest error has intervened to the prejudice of the appellant, to wit:

1. The Court erred in denying the motion of the complainant for a preliminary injunction and in not holding that the act of the General Assembly of the State of New York, entitled "An Act to amend the highway law, in requiring indemnity bonds or insurance policies from owners of motor vehicles transporting passengers for hire in cities of the first class", is unconstitutional and violates the Fourteenth Amendment to the Constitution of the United States, providing that no State should deny to any person within its jurisdiction the equal protection of the laws nor deprive a person of his life, liberty and property without due process of law.

2. The Court erred in holding that the bill of complaint
46 does not state facts sufficient to constitute a cause of action and in dismissing the bill without prejudice.

Wherefore appellant prays the decree aforesaid may be reversed with directions to grant the relief prayed for in the bill of complaint, etc.

HOUSE, GROSSMAN & VORHAUS,
Attorneys for Appellant.

Endorsed: Filed Aug. 3, 1922.

47 Know all men by these presents, that we, William Henry Packard, as principal, and National Surety Company, of No. 115 Broadway, Borough of Manhattan, City of New York, as Surety, are held and firmly bound unto Joab H. Banton, District Attorney in and for the County of New York, and Charles D. Newton Attorney General of the State of New York, in the full and just sum of Two Hundred and Fifty ($250.00) Dollars, to be paid to the said Joab H. Banton, District Attorney in and for the County of New York, and Charles D. Newton, Attorney General of the State of New York, certain attorney, executors, administrators or assigns, to which payment well and truly to be made, we bind our-

selves, our heirs, executors and administrators jointly and severally by these presents. Sealed with our seals and dated this 2nd day of August, in the year of our Lord one thousand nine hundred and twenty-two.

Whereas, lately at a term of the District Court of the United States for the Southern District of New York, in a suit depending in said Court between William Henry Packard, complainant, and Joab H. Banton, District Attorney in and for the County of New York, and Charles D. Newton, Attorney General of the State of New York, Defendants, a decree was rendered against the said William Henry Packard, denying his motion for a preliminary injunction and dismissing his bill without prejudice, and the said William Henry Packard having obtained an appeal and filed a copy thereof in the Clerk's office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said Joab H. Banton, District Attorney in and for the County of New
48 York, and Charles D. Newton, Attorney General of the State of New York, citing and admonishing them to be and appear at a Supreme Court of the United States at Washington within thirty days from the date thereof.

Now the condition of the above obligation is such that if the said William Henry Packard shall prosecute his appeal to effect and answer all damages and costs, if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

WILLIAM H. PACKARD. [SEAL.]
[SEAL.] NATIONAL SURETY COMPANY,
By F. G. BEATTIE, [SEAL.]
Resident Vice-President.

Attest:
M. C. McGRATH, [SEAL.]
Resident Assistant Secretary.

Sealed and delivered in presence of
LOUIS TYROLER.

Endorsed: Approved Aug. 2, 1922. Augustus N. Hand, D. J.
Endorsed: Filed Aug. 3, 1922.

49 United States District Court for the Southern District of New York.

WILLIAM HENRY PACKARD, Complainant,

vs.

JOAB H. BANTON, District Attorney in and for the County of New York, and Charles D. Newton, Attorney General for the State of New York, Defendants.

On reading the petition of the complainant, William Henry Packard, it is

Ordered that an appeal be and the same is hereby allowed to said complainant from the decree of this Court entered on the 22nd day of July, 1922, to the Supreme Court of the United States on condition that said complainant file his appeal bond in the sum of Two Hundred Fifty Dollars ($250.00), as provided by law.

And for good cause shown it is

Ordered that the time within which the appellant may file his record in the Supreme Court of the United States be and the same is hereby extended to and including the third day of October, 1922.

Dated, New York, August 2, 1922.

AUGUSTUS N. HAND,
United States District Judge.

Endorsed: Filed August 3, 1922.

50 In the District Court of the United States, Southern District of New York.

WILLIAM HENRY PACKARD, Plaintiff,

against

JOAB H. BANTON, District Attorney in and for the County of New York, and Charles D. Newton, Attorney General of the State of New York, Defendants.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated August 29, 1922.

HOUSE, GROSSMAN & VORHAUS,
Attorneys for Plaintiff.
JOHN CALDWELL MYERS,
Attorney for Defendant Joab H. Banton.
EDWIN G. GRIFFIN,
Deputy Attorney General,
Attorney for Defendant Charles D. Newton.

51 UNITED STATES OF AMERICA,
Southern District of New York, ss:

WILLIAM HENRY PACKARD, Plaintiff,

vs.

JOAB H. BANTON, District Attorney in and for the County of New York, and Charles D. Newton, Attorney General of the State of New York, Defendants.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the

record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 29th day of August, in the year of our Lord one thousand nine hundred and twenty-two and of the Independence of the said United States the one hundred and forty-seventh.

[Seal of District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR.,
Clerk.

Endorsed on cover: File No. 29,157. S. New York D. C. U. S. Term No. 607. William Henry Packard, appellant, vs. Joab H. Banton, as district attorney in and for the county of New York, and Charles D. Newton, as attorney general for the State of New York. Filed September 22nd, 1922. File No. 29,157.

No. 126

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

WILLIAM HENRY PACKARD,

Appellant,

vs.

JOAB H. BANTON, as District Attorney of the County of New York, and CHARLES D. NEWTON, Attorney General of the State of New York,

Appellees.

BRIEF IN BEHALF OF APPELLANT.

LOUIS J. VORHAUS,
Attorney for Appellant.

LOUIS J. VORHAUS,
ELIJAH N. ZOLINE,
FREDERICK HEMLEY,
of Counsel.

The Hecla Press, 57 Warren St., N. Y. Tel. Barclay 6280.

SUBJECT INDEX.

ALPHABETICAL TABLE OF CASES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

WILLIAM HENRY PACKARD,
Appellant,

against

JOAB H. BANTON, District Attorney in and for the County of New York, and CHARLES D. NEWTON, Attorney General of the State of New York,
Appellees.

BRIEF IN BEHALF OF APPELLANT.

This is an appeal from the decree of the United States District Court for the Southern District of New York, entered on July 17, 1922, denying a preliminary injunction and dismissing the bill for want of equity (Record, 10). The appeal was taken directly to this Court because the constitutionality of an Act of the State of New York is directly involved in this proceeding.

This is a bill in equity to restrain the District Attorney of the County of New York and the Attorney General of the State of New York from

enforcing an Act of the General Assembly of the State of New York, which became a law on April 13, 1922—"An act to amend the Highway Law, in requiring indemnity bonds or insurance policies from owners of motor vehicles transporting passengers for hire in cities of the first class," reading as follows:

> "§ 282-b. INDEMNITY BONDS OR INSURANCE POLICIES IN CITIES OF THE *first* CLASS. Every person, firm, association or corporation engaged in the business of carrying or transporting passengers for hire in any motor vehicle, *except street cars, and motor vehicles operated under a franchise by a corporation subject to the provisions of the public service commission law over, upon or along any public street in a city of the first class* shall deposit and file with the state tax commission for each motor vehicle intended to be so operated, either a personal bond, with at least two sureties approved by the state tax commission, a corporate surety bond or a policy of insurance in a solvent and responsible company authorized to do business in the state, approved by the state tax commission, in the sum of two thousand five hundred dollars, conditioned for the payment of any judgment recovered against such person, firm, association or corporation for death or for injury to persons or property caused in the operation or the defective construction of such motor vehicle. Such bond or policy of insurance shall contain a provision for a continuing liability thereunder notwithstanding any recovery thereon. If at any time, in the judgment of the state tax commission, such bond or policy is not sufficient for any cause, the commission may require the owner of such motor vehicle to replace such bond or policy with another ap-

proved by the commission. Upon the acceptance of a bond or policy, pursuant to this section, the state tax commission shall issue to the owner of such motor vehicle a certificate describing such vehicle and that the owner thereof has filed a bond, or policy, as the case may be, required by this section. Either a personal or corporate surety upon a bond filed pursuant to this section or an insurance company whose policy has been so filed, may file a notice in the office of the state tax commission that upon the expiration of twenty days from such filing such surety will cease to be liable upon such bond, or in the case of such insurance company, that upon the expiration of such time such policy will be canceled. The state tax commission shall thereupon notify the owner of such motor vehicle of the filing of such notice, and unless such owner shall file a new bond or policy of an insurance company, as provided by this section, within such time as shall be specified by the state tax commission, such owner shall cease to operate or cause such motor vehicle to be operated, in such city, and the registration of such motor vehicle shall be automatically revoked. Any person, firm, association or corporation, operating a motor vehicle in a city of the first class, as to which a bond or policy of insurance is required by this section who or which shall operate such vehicle, or cause the same to be operated, while such a bond or policy, approved by the state tax commission as required by this section, is not on file with the tax commission, shall be guilty of a misdemeanor.

§ 2. This act shall take effect July first, nineteen hundred and twenty-two."

The suit is brought by the complainant in behalf of himself and all other persons similarly situated.

The affidavits attached to the complaint show that about 15,000 persons, *i. e.*, owners of taxicabs and taxi drivers, will be affected by the provisions of said Act when it goes in effect.

The bill further alleges in substance that since the passage of said Act the insurance companies doing business in Greater New York have fixed a rate of premium for a continuing bond of $2,500 for each motor vehicle in the sum of $960; that the net income from the operation of a motor vehicle is approximately $35 per week; that as a result of said law the net income of a taxicab man would be reduced approximately to $16.50 per week, and that the practical operation of said law will result in confiscation of the earnings of the complainant for the benefit of the insurance companies.

The bill charges that said Act is unconstitutional and violates the Fourteenth Amendment to the Constitution of the United States forbidding any State to "deny to any person within its jurisdiction the equal protection of the laws," and that it also deprives the complainant and all other persons similarly situated of due process of law guaranteed by said Fourteenth Amendment.

It is charged that the law discriminates against the complainant and all other taxicab owners in the following manner:

> A. That said Act discriminates between common carriers of the same class, *i. e., expressmen* using the streets for the delivery of freight for hire in and about the public streets in cities of the first class in the State of New York, and who, like the complainant, are not subject to the provisions of the Public Service Laws of the State of New York.

B. That it further discriminates between common carriers *by exempting from such statute street cars and motor vehicles operated under a franchise by a corporation subject to the provisions of the Public Service Commission Law.*

C. That is further *discriminates in favor of all owners of motor vehicles* carrying or transporting passengers for hire in all parts of the State of New York *other than in cities of the first class.*

D. That it further *discriminates in favor of taxicabs operated for hire in cities other than of the first class* in the State of New York where this statute by its terms is not operative, and thus not only discriminates between persons engaged in the same vocation, but discriminates against and in favor of injured persons in the different parts of the State.

E. That it discriminates in *favor of owners of private motor cars used for conveyance of passengers but not for hire as well as for conveyance of freight.*

On this bill an order was made requiring the defendants to show cause why the injunction should not be granted. The matter was heard before a statutory Court, consisting of three Judges, organized for the purpose of hearing this application.

On this hearing the Attorney General of the State of New York filed an answer admitting the allegations contained in paragraphs 1, 2, 3 and 6 of the bill, and denying the allegations set forth in paragraph 4. The defendant is without knowledge as

to the facts set forth in paragraph 5 of the bill of complaint (Record, 7).

The defendant, District Attorney of the State of New York, filed a motion to dismiss the bill (Record, 9).

At this hearing the following affidavits were submitted and read before the Court:

THE AFFIDAVIT OF THE PLAINTIFF

(Record, 12 *et seq.*).

That he is the owner of four taxicabs and has been operating taxicabs for upwards of six months in the City of New York; that from his personal experience affiant knows that the average net income of a taxicab driver in the City of New York is not in excess of $35 per week, and in many instances it is considerably less than $35 net per week; that all the insurance companies doing business in the City of New York have fixed $960 per year as the premium for a $2500 bond as required by the law recently enacted and which law becomes operative on the 1st day of July next. This premium is at the rate of approximately $18.50 per week; that with a net income not in excess of $35 per week, and with an obligation to pay approximately $18.50 per week for the insurance, the net amount in the hands of the taxicab driver would not be in excess of $16.50 per week; that most taxicab owners do not own their cars outright, but purchase their cars subject to a chattel mortgage requiring the payment of a certain amount per month. In most instances the amount paid on account of the chattel mortgage is $100 per month, plus interest. It is therefore evident that the taxi-

cab driver will not have sufficient money out of his income from his occupation with which to pay the mortgage nor will any money be left from which he and his family may live. A vast majority of the taxicab drivers are married men and have families to support and the additional burden required by the payment of the premium will make it impossible for the taxicab driver to continue in his present calling; that it is to be borne in mind that the rate that the taxicab driver may charge is fixed by law and at the present time the various taxicab drivers do not charge the full rate allowed by law, for the reason that the public would not patronize the taxicabs if the full rate were charged, so that there is no possibility of securing an additional income by charging a greater rate.

A tabulation from the records furnished by the Medical Department of the City of New York was made showing the number of deaths attributable to accidents in the years 1918 and 1919 in the City of New York. Annexed hereto and made a part hereof is a copy of such tabulation; that the total number of deaths attributable to automobile accidents in the City of New York for the year 1918 was 652; of this number 14 are attributable to accidents in which taxicabs figure and 467 are attributable to automobiles other than taxicabs, including private cars, and 171 are attributable to auto trucks, and for the year 1919 the total number of deaths in the City of New York attributable to automobile accidents is 702, and of this number 23 are attributable to accidents in which taxicabs figure and 424 are attributable to automobiles other than taxicabs, including private cars, and 255 to commercial autos.

THE AFFIDAVIT OF PATRICK J. DEVINE

(Record, 14-15).

That he has been and is the owner and driver of a taxicab for about eleven years past, and for the last two years his net income has not exceeded $30 per week, and frequently was considerably less. In order to make this amount it was necessary for him to work on the average of twelve to fourteen hours a day; that there are upwards of 15,000 taxicab owners in the same position that he is in in the City of New York. Most of them are married men and have families dependent upon them; that he made inquiries from the insurance companies in the City of New York and knows that the premium that they are asking for the bond in accordance with the law recently enacted is $960 per year, which is approximately $18.50 per week. It will not be possible for him or others similarly situated to pay a premium of that kind from the income that he and others have been deriving from the operation of taxicabs and there will be no alternative but to give up that calling. That he made inquiries amongst his friends in the hope of being able to get a private bond, as permitted by the statute, and finds that it will be impossible for him to get any individuals who are either willing or able to go on any private bond, such as is demanded by the statute, and he also knows from conversations with other taxicab owners that they also will find it impossible to get private bondsmen. It is a matter of common knowledge that there are thousands of automobile trucks doing a private trucking business in the City of New York, being common carriers from one point to another in the City of New York and from the City of New York to other points, and these individuals will not be com-

pelled to give any bond in accordance with the requirements of the statute. It is a matter of common knowledge that these private common carriers have in the past had a great many more accidents than taxicab drivers have had.

THE AFFIDAVITS OF GENNARO PUCILLA, MORRIS POLLOCK AND LOUIS WARSHAW are substantially the same as that of Mr. Devine above recited.

Attached to the affidavit of CHARLES C. SCHWARTZ is a tabulation of the Medical Department of the City of New York showing the number of deaths attributable to accidents upon the streets and highways of the City of New York during the years 1920 and 1921 (Record, 19), showing the percentage of accidental deaths caused by taxicabs to be very small as compared with privately owned cars or other transportation vehicles.

Affidavits in opposition were submitted by the defendants, viz.:

THE AFFIDAVIT OF HARVEY J. DRAKE

(Record, 22-23).

The affiant is counsel for the Insurance Department; that the Act was passed in pursuance to public agitation because those engaged in the taxicab business were financially irresponsible; that during the year 1921 sixty persons were killed by taxicabs; on hearsay, affiant states that the number of unpaid judgments for deaths caused by accidents due to the negligence of taxicab drivers was 12,000. From the information received by affiant, he is of the opinion that the rate of pre-

mium for writing the bond in question would be about $45 per month.

THE AFFIDAVIT OF JACOB KENDRICK UPTON is to the effect that of the taxicabs operating in New York not more than 5 per cent. carry any liability insurance; that there are operating in New York City about 325,000 automobiles other than taxicabs and about 13,000 taxicabs; that there were injured by automobiles other than taxicabs in the City of New York, 15,564 persons, being a ratio of one to twenty-two; that according to the same figures, there were killed and injured by taxicabs within the City of New York in the year 1921, 2,056, being a ratio of one to six; that the rate for premium for a taxicab bond to be charged by all mutual automobile insurance companies is $540 per year; that the average wage earned by a taxicab driver is between $40 and $50 per week (Record, 26-27).

THE AFFIDAVIT OF WILLIAM COOPER is to the effect that he drives his own taxicab and operates it throughout the City of New York and has done so for the past five years. His average earnings for the past three months have been $100 per week, including tips. It costs him $35 per week to operate and maintain his taxicab, including depreciation. Of the $35 of expense per week, $10 is depreciation on a new Dodge bought last March. The greater number of taxicab operators use second-hand cars on which the depreciation has been absorbed; that the ordinances of the City of New York permit a charge of 30 cents for the first half mile or any fraction thereof for not more than two persons, and 40 cents for three or more passengers; 10 cents is allowed for each succeeding quarter of

a mile or fraction thereof for two passengers, and 10 cents for every succeeding sixth of a mile for three persons. For each piece of luggage carried outside, excepting handbags and suitcases, 20 cents is charged. The waiting time allowed under the ordinance is $1.50 per hour. However, three-quarters of the taxicab drivers do not charge the maximum amount permitted by the city ordinances, but charge only 40 cents for the first whole mile and 30 cents for each additional mile. In the taxicab business the average charge for a ride is between 60 and 70 cents (Record, 28).

THE AFFIDAVIT OF WILLIAM E. MCGUIRK is to the effect that he is treasurer and general manager of the American Yellow Taxi Operators, Inc., owning and operating 303 taxicabs made by the same manufacturer as those operated by the plaintiff and costing within $150 of the same as his; that he has been engaged in the manufacture and sale of taximeters, the sale of taxicabs and their operation over fifteen years in the City of New York; that he read the bill of complaint and the supporting affidavits of the plaintiff. Plaintiff operates what is known as "Green Flag Taxis" and does not charge the maximum rate permitted by ordinance. Affiant is of the opinion, from his general knowledge of the operations of taxicabs in the City of New York, that the average gross earnings upon a taxicab well managed in the City of New York over a period of twelve months is not less than $210 per week, operated twenty hours per day by two drivers. It is the general custom to double shift the cabs. The average net profit over the same period from each cab is not less than $60 per week (Record, 29).

An additional affidavit was submitted on behalf of the plaintiff, William Henry Packard, in which he states that the four cars referred to in the bill of complaint, owned by him, cost him $11,200, and are worth that sum to him providing he can continue in the business of operating taxicabs, but if for any reason he shall be unable to continue in the business of operating taxicabs, he would not be in a position to realize more than 50 per cent. of the cost thereof to him. Affiant inquired amongst his relatives and friends for the purpose of ascertaining whether it would be possible for him to get individuals to go on private bonds for him, so as to avoid the necessity of having any insurance company bonds, but he has neither friends nor relatives who would be able and willing to qualify as individual bondsmen. Therefore, if the law is upheld affiant will be compelled to secure insurance company bonds, or else go out of business. It would cost $960 per year per car, which means an expense of $3,840 per year to him. In other words, affiant is faced with this situation, that either he must pay $3,840 per year for insurance or else he must sacrifice his business and the good-will thereof—which good-will he values in excess of $5,000—and at the same time he would be compelled to sacrifice the four cars at a loss to him in excess of $5,000 on the cars, making a loss to him in toto in excess of $10,000. On the other hand, if he were to operate his taxicabs without securing bonds, and if the law were held to be constitutional, he would be liable as a misdemeanant, and he is informed that the maximum penalty for a misdemeanor is imprisonment for one year or a fine of $500, or both, so that if he were to operate his four cars, he would be

liable for each operation in sums aggregating $2,000 (Record, 21).

On hearing, the Court denied the motion for preliminary injunction and dismissed the bill (Rec., p. 10). Hence the appeal to this Court.

Errors Relied Upon.

1. The Court erred in denying the motion of the complainant for a preliminary injunction and in not holding that the act of the General Assembly of the State of New York, entitled "An Act to amend the highway law, in requiring indemnity bonds or insurance policies from owners of motor vehicles transporting passengers for hire in cities of the first class," is unconstitutional and violates the Fourteenth Amendment to the Constitution of the United States, providing that no State should deny to any person within its jurisdiction the equal protection of the laws nor deprive a person of his life, liberty and property without due process of law (Assignment of Errors No. 1, Record, 31).

2. The Court erred in holding that the bill of complaint does not state facts sufficient to constitute a cause of action and in dismissing the bill without prejudice (Assignment of Errors No. 2, Record, 31).

I.

Preliminary Questions Relating to the Jurisdiction of the Court Below.

In his answer, the Attorney General admits paragraph 3 of the bill, which alleges that the amount in dispute exceeds the sum of $3,000, exclusive of interest and costs, but the defendant, Joab H. Banton, District Attorney, filed a motion to dismiss the bill, in which it is, among other things, stated:

(a) That no sufficient facts are averred in the bill of complaint to show that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.

(b) That it appears upon the face of the bill that the court of equity has no jurisdiction.

(c) That the District Attorney may not be enjoined to enforce a criminal statute.

As to the Jurisdictional Amount.

The bill affirmatively alleges that the amount in controversy exceeds, exclusive of interest and costs, the sum of $3,000 (see par. I of the Bill of Complaint). This is admitted by the motion to dismiss. Moreover, the statute in question which is fully set up in paragraph III of the bill shows that a violation of same constitutes a misdemeanor. A misdemeanor under the laws of New York is punishable by one year imprisonment or a fine of $500. For the operation of four cars without complying with

the statute the penalty for each offense would be $2,000.

The amount of the penalty is a proper subject of computation for jurisdictional purposes.

> *American Fertilizing Co.* v. *Board of Agriculture,* 43 Fed., 609.

The bill further shows that the premium for each bond for the operation of each car would amount to $960 and that the premiums to be paid for the insurance for the four cars will amount to $3,840.

In addition to that, the plaintiff's good will, which he values at $5,000, would be lost to him (see additional affidavit of the plaintiff, Record, 21).

The value of the matter in dispute may for the purpose of jurisdiction be shown by affidavits.

> *Carr* v. *Fife,* 156 U. S., 494.
> *Gage* v. *Pumpelly,* 108 U. S., 164.

Aside from the plaintiff's affidavit, the allegations of the bill, standing by themselves, are amply sufficient.

> *City of Hutchinson* v. *Beckham,* 118 Fed., 399 (syllabus 2) (C. C. A.).
> *Butchers & Drovers Stockyards Co.* v. *Louisville & Nashville R. R. Co.,* 67 Fed., 35 (C. C. A.).
> *Rocky Mt. Bell Tel. Co.* v. *Montana Federation of Labor,* 156 Fed., 809.

It is well settled that in a suit to enjoin for threatened or continued commission of certain acts, the amount in dispute, for jurisdictional purposes, is not determined by the amount which the complainant might recover from defendant in an

action at law for the acts complained of, *but by the value of the right to be protected, or the extent of the injury to be prevented by the injunction.*

Scott v. *Donald,* 165 U. S., 107.
Nashville, C. N. St. L. Ry. Co. v. *M'Connell,* 82 Fed., 65.
Butchers & Drovers Stockyards Co. v. *Louisville & Nashville R. R. Co.,* 67 Fed., 35 (C. C. A., 290).
City of Hutchinson v. *Beckham,* 118 Fed., 399.

This is particularly true in cases involving the conduct of business which is unconstitutionally restrained.

See authorities, *supra.*

An Injunction is the Proper Remedy.

It is no longer open to question that the court of equity may restrain the enforcement of unconstitutional criminal statutes or ordinances.

Ex parte Young, 209 U. S., 123.
Western Union v. *Andrews,* 216 U. S., 165.
Hammer v. *Dagenhart,* 247 U. S., 251.
Rast v. *Van Deeman,* 240 U. S., 342.
Philadelphia Co. v. *Stimson,* 223 U. S., 605.
Dobbins v. *Los Angeles,* 195 U. S., 233, and cases there cited.
Weed v. *Lockwood,* 266 Fed., 785 (C. C. A., 2nd Circuit, opinion per Manton, *J.*), holding that District Attorney may be enjoined.

Lusk v. *Town of Dora,* 224 Fed., 650.
Cramp & Sons v. *International Turbine Co.,* 246 U. S., 28.

The District Attorney and the Attorney General Are Proper Parties.

It is well settled that the prosecuting officers of a State are proper parties and may be enjoined to enforce an unconstitutional statute.

Truax v. *Raich,* 239 U. S., 33.
Little v. *Tanner,* 208 Fed., 605.
Ex parte Young, 209 U. S., 123.

It is well settled that where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity.

Hammer v. *Dagenhart,* 247 U. S., 251.
Dobbins v. *Los Angeles,* 195 U. S., 223.
Ex parte Young, 209 U. S., 123.
Davis v. *Berry,* 216 Fed., 413.
Kinnane v. *Detroit Creamery Co.,* 255 U. S., 102.

ARGUMENT ON THE MERITS.

POINT I.

The Act in question contravenes the Fourteenth Amendment to the Constitution of the United States.

The Fourteenth Amendment to the Constitution of the United States forbids any State to deny "to any person within its jurisdiction the equal protection of the laws."

While it is no longer open to question that a State may classify the subjects of its laws and make provisions applicable to one class of subjects that have no application to another class, yet it is equally well established that the members of these classes may not be selected arbitrarily without just or sound reason, inherent in their respective situations and circumstances relative to the subject-matter of the legislation for the difference in the burdens imposed and the privileges conferred upon them by such a discriminatory law.

The Object of the Statute—The Discriminative Features.

The only hypothesis upon which the statute in question could be sustained is that it was passed under the police power of the State for the purpose of protecting the public against the negligent operation of a motor vehicle by a common carrier for hire by insuring it in a measure—a recovery of damages in the event a judgment should be en-

tered against such common carrier. But, if this be the object of the legislation, it falls short of attainment by reason of the many exemptions provided by it or because of the limited class to which it by express terms is made applicable.

(a) The Act in question here exempts:

Expressmen transporting in large automobile trucks all kinds of freight upon and along the crowded public streets of Greater New York, and who, like the taxicabs, are not within the jurisdiction of the Public Service Commission. No reason is perceived why a burden, such as is imposed upon owners of taxicabs, should not be imposed upon the owners and operators of express automobiles—*both being common carriers.* The Court will take judicial notice that the operation of large trucks and vans upon the public streets is by far more dangerous to pedestrians and those driving along such streets than the operation of a small taxicab. We, therefore, respectfully contend that the statute in question here is discriminatory and class legislation and violates the spirit of the Fourteenth Amendment of the Constitution of the United States and is contrary to the principles of civil liberty and natural justice. It gives to a part of a class of citizens privileges and advantages which are denied to all others in the State under like circumstances, and subjects one branch of the same class to burdens from which all others, under like circumstances, are exempted.

Holden v. *James,* 11 Mass., 396.
Lippman v. *People,* 175 Ill., 101.

That expressmen and taxicab men are both common carriers is well settled. All who pursue the business of carrying passengers or goods or information for hire for the public generally, railroad companies, express companies, telegraph companies, telephone companies, street car companies, owners and operators of omnibuses, cabs, carriages, carts, drays, trucks, sleds, boats, and many other vehicles are common carriers.

Hutchinson, Carriers, 2d ed., §§ 58-69.

(b) *Street cars and motor buses.*

There seems to be no good reason for exempting from the operation of the statutes street cars and motor vehicles operated under a franchise by a corporation subject to the provision of the Public Service Law. If, as already stated, the object of this legislation was to insure the public to recover damages by reason of the careless operation by common carriers of a car self-propelled, then no valid ground exists for exempting street railways and owners of buses from the operation of the statute. Experience has shown, and the record sustains our contention, that the fact that a common carrier happens to be a street railway is no guarantee that a judgment for personal injuries or injuries to property recovered against it would be collected. On the contrary, the bill of complaint in the instant case (Rec., p. 4) shows that many street railways have gone into receivership, and that for many years last past they were unable to pay claims for personal injuries. This is admitted by the motion to dismiss filed by the District Attorney of New York County. Why, then, should a street railway be exempt from furnishing

a bond to protect the public from the negligent operation of a street car? In the cases where a classification for street railways was sustained it was assumed, without evidence, that street railways are more solvent than the owners of jitneys; but, in the instant case, there is no room for indulging in presumptions because the facts as they actually exist are brought before the Court, thus demonstrating that there is in fact no real basis for the classification made by the Legislature.

Test of Constitutionality Under the Fourteenth Amendment.

In order to justify a discrimination in face of the constitutional provision against unequal laws, there are three indispensable conditions to a constitutional imposition of liabilities or burdens upon or a constitutional grant of rights or privileges to the members of one class which the other members of the State do not bear or enjoy. There must be

First: A difference between the situation and circumstances of all the members of the class and the situation and circumstances of other members of the State in relation to the subjects of the discriminatory legislation as presents a just and natural reason of necessity or propriety for the difference made by the law in their liabilities and rights. While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classi-

fication cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification.

Gulf, C. & S. F. R. Co. v. *Ellis,* 165 U. S., 150, 155, 165.

Cotting v. *Kansas City Stock Yards Co.* (*Cotting* v. *Godard*), 183 U. S., 79, 107-112.

Connolly v. *Union Sewer Pipe Co.,* 184 U. S., 540, 559.

Atchinson, Santa Fe Ry. Co. v. *Vosburg,* 238 U. S., 56.

Southern R. Co. v. *Greene,* 216 U. S., 400, 536.

Nichols v. *Walter,* 37 Minn., 264; 33 N. W., 800.

Lavallee v. *St. Paul, M. & M. R. Co.,* 40 Minn., 249.

State v. *Loomis,* 115 Mo., 307, 314.

Ballard v. *Mississippi Cotton Oil Co.,* 81 Miss., 507.

SECOND: No person who does not belong to the class may be included therein, and all persons within the influence of the legislation relative to the class must be treated alike thereby.

See authorities, *supra.*

THIRD: All who are in situations and circumstances relative to the subject of the discriminatory legislation indistinguishable from the situations and circumstances of the members of the class must be brought under the influence of the legislation and treated by it in the same way as are the members of the class.

An act of class legislation, to stand in the face of the Constitution, must include all who belong to the class; not all who bear similarity in some characteristic to those included, but all who cannot be distinguished from them in that particular characteristic which justified the act. And it must include none who do not belong to the class.

> *Bassette* v. *People,* 193 Ill., 334, and cases cited.
> *Lippman* v. *People,* 175 Ill., 101.

The rule announced by the Supreme Court of Illinois is likewise the rule in the United States Court in its application to the Fourteenth Amendment.

Thus, in *Connolly* v. *Union Sewer Pipe Co., supra* (184 U. S., 540), a statute of Illinois directed against trusts and combinations, was held to contravene the Federal Constitution because it arbitrarily excepted from its scope and operation combinations in agricultural products and live stock. It was there said:

> "Arbitrary selection can never be justified by calling it classification. The equal protection commanded by the 14th Amendment forbids this."

In *Gulf, C. & S. F. R. Co.* v. *Ellis* (165 U. S., 150) a statute which authorized the award of judgment in actions against railway companies of costs not given in suits against other defendants, was held void as violating the equal protection of the law guaranteed by the Federal Constitution in that it singled them out from all citizens and corporations. It was there said:

> "Classification for legislative purposes must have some reasonable basis upon which to stand. But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this."

In *Cotting* v. *Kansas City Stock Yards Co., supra* (183 U. S., 79), the act attacked, in terms applied only to certain stock yards in the State of Kansas, which for the preceding twelve months had an average daily receipt of not less than 100 head of cattle or 300 head of hogs or 300 head of sheep. For this reason the Supreme Court held it on a review of cases to be unconstitutional.

In deciding the case, the U. S. Supreme Court, among other cases, quoted from the case of *Vanzant* v. *Waddel,* 2 Yerger, 262, 270, reading as follows:

> "Every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another."

And in the course of the opinion the U. S. Supreme Court said:

> "The Fourteenth Amendment forbids any State to 'deny to any person within its jurisdiction the equal protection of the laws.' The scope of this prohibition has been frequently considered by this court.
>
> "In Barbier v. Connolly, 113 U. S., 27, 31, it was said:

'The Fourteenth Amendment, in declaring that no State "shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their person and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses.'

"And in Bell's Gap Railroad v. Pennsylvania, 134 U. S., 232, 237:

'The provision in the Fourteenth Amendment that no State shall deny to any person within its jurisdiction the equal protection of the laws was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any

taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our government, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject that would include all cases.'

"In Gulf, Colorado and Santa Fe R. R. Co. v. Ellis, 165 U. S., 150, 159, which presented solely the question of classification, we said, referring to many cases, both State and national:

'But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court, in Yick Wo v. Hopkins, 118 U. S., 356, 369: "When we consider the nature

and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power." The first official action of this nation declared the foundation of government in these words: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness." While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government.'"

(c) *Owners of pleasure vehicles and trucks.*

Tested by these rules as laid down by the courts, the act is further unconstitutional by reason of the discriminating aforesaid, and, it is submitted, that it is difficult to perceive why owners of pleasure vehicles and auto trucks using the streets indiscriminately, and who by training and experi-

ence are less competent to operate a motor vehicle than a taxicab driver, should be exempt from the operation of a law, and why such onerous burdens should be imposed upon owners of taxicabs. Experience has shown, and the affidavits in the instant case show, that the greater part of the accidents in and upon the streets of Greater New York are the result of negligent driving done by owners of pleasure vehicles rather than those of taxicab drivers—the statistical figures being as follows:

The total number of deaths attributable to automobile accidents in the City of New York for the year 1918 was 652; of this number 14 are attributable to accidents in which taxicabs figure and 467 are attributable to automobiles other than taxicabs, including private cars, and 171 are attributable to auto trucks; for the year 1919 the total number of deaths attributable to automobile accidents is 702, and of this number 23 are attributable to accidents in which taxicabs figure and 424 are attributable to automobiles other than taxicabs, including private cars, and 255 to commercial autos.

(See Affidavit of William H. Packard, Record, 13).

The total number of deaths attributable to automobile accidents in the City of New York for the year 1920 was 690; of this number 26 are attributable to accidents in which taxicabs figure and 403 are attributable to automobiles other than taxicabs, including private cars, and 261 are attributable to auto trucks; for the year 1921 the total number of deaths in the City of New York attributable to automobile accidents is 786, and of this number 53 are attributable to accidents in which taxicabs figure and 478 are attributable to automobiles other

than taxicabs, including private cars, and 255 are attributable to commercial autos.

(See Affidavit of Charles C. Schwartz, Record, 19).

POINT II.

The classification provided for by the Act, by applying the operation of it only to cities of the first class, is unreasonable and discriminates between members of the same class of common carriers plying their vocations in different parts of the State—the statute therefore contravenes the Fourteenth Amendment to the Constitution of the United States.

The Act discriminates between the owners of motor vehicles carrying passengers *for hire* upon the streets of cities of the first class and other taxicab owners engaged in the same business in other parts of the State. Under this Act owners and operators of taxicabs upon the streets of any city or village other than a first class city need not furnish the security provided for in the Act. The statute thus places onerous burdens upon members of the same class in the same State not common to all other citizens of the State similarly situated. . .

We respectfully refer to the authorities cited in Point I of this brief as fully applicable to the point now under discussion. In addition thereto we respectfully submit that classification by population will not stand unless there is a good reason for such classification.

Bassette v. *People*, 193 Ill., 334.
1 *Dill Mun. Corp.*, 5th ed., § 151.
Cooley Const. Lim., 7th ed., 558-559.
Fleming v. *City of Memphis*, 148 S. W. (Tenn.), 1057.
Sutton v. *State*, 96 Tenn., 696; 33 L. R. A., 589; 36 S. W., 697.
City of Janesville v. *Carpenter*, 8 L. R. A., 808 (Wis.).
1 *Elliott, Roads & Streets*, § 521.

In *Bassette* v. *People*, 193 Ill., 334, the Supreme Court of Illinois passed upon the validity of a statute providing for the licensing of horseshoers. That statute classified the municipalities into those of 50,000 or more inhabitants where the act shall be operative, those between 10,000 and 50,000 where it may be operative at the option of the municipalities, and those below 10,000 where it shall not be operative. In holding the statute unconstitutional, the Supreme Court, per Magruder, *J.*, said:

> "Cooley, Const. Lim., 6th ed., pp. 481, 483, says: 'A statute would not be constitutional which should select particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens from which others in the same locality or class are exempt. Everyone has a right to demand that he be governed by general rules, and a special statute, which without his consent singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments.' In the case at bar, the act deals with one class of workmen, to wit,

horseshoers. It grants to horseshoers living in cities and towns containing a population less than 10,000, and in those containing a population between 10,000 and 50,000 a special privilege, to wit, the privilege of being exempt, either entirely or conditionally, from the obligation to take out licenses to pursue their business, *while it requires horseshoers living in cities and towns containing a population of 50,000 or over to obtain such license. The manner in which the act discriminates in favor of particular persons of one class pursuing one occupation, and against all others of the same class, places it in opposition to the constitutional guaranties hereinbefore referred to.* * * *

"The observations thus made render it unnecessary for us to consider the question whether the court below did or did not err in admitting in evidence the ordinance set forth in the statement of facts preceding this opinion. In view of what has been said, it is immaterial whether the act in question, if applicable to towns and cities, could have been adopted by a town or city by ordinance, or whether it was necessary to secure its adoption by submitting it to a vote of the people living in such town or city.

"For the reasons herein stated, we are of the opinion that the act in question is unconstitutional. This being so, the court below erred in refusing to hold as law the propositions submitted by the plaintiff in error which declared it to be unconstitutional."

In *Fleming* v. *City of Memphis,* 148 S. W., 1057 (Tenn.), the question presented for determination was the validity of Acts of Tennessee, which read as follows:

"That the counties in which the taxing districts are situated, and the taxing dis-

> tricts themselves, shall not be liable for damages or injuries to persons or property by reason of defects in the streets or alleys or other property under the control and within said taxing districts, or for the conduct of those managing the affairs of such districts."

In holding the Act unconstitutional, the Court said:

> "We think it too clear for argument at this late day that the exemption, or 'special dispensation,' as counsel denominate it, in favor of the city of Memphis in the foregoing provision of its charter, is violative of the section of the Constitution just quoted.
>
> * * *
>
> "It is true that laws public in their character, and otherwise unobjectionable, may extend to all citizens, or be confined to particular classes. With respect to the provision of the Constitution under consideration, citizens or municipalities may be classified when the object of the legislature is to confer upon them certain rights, privileges, immunities, or exemptions not enjoyed by the community at large. But this classification must not be mere arbitrary selection. It must have some basis which bears a natural and reasonable relation to the objects sought by the legislation, and there must be some good and valid reason why the particular municipality upon whom the benefit is conferred should be preferred."

In *State* v. *Whitcom,* 122 Wis., 110; 99 N. W., 468, a statute which exempted, among others, dealers in agricultural implements maintaining permanent places of business, keepers of retail meat markets, fish dealers, and sellers of fruit or vegetables *in cities of certain classes,* was held to

deny a peddler of teas and coffees the equal protection to which the Federal and State Constitutions entitled him, whether the purpose of such act was taxation or a regulation of conduct. The Court said:

> "Other glaring false classification is presented by the exemption of dealers in agricultural implements maintaining permanent places of business, or keepers of retail meat markets, or fish dealers, and sellers of fruits or vegetables in cities of the first class, selling their respective wares. What consideration of public welfare could exclude a retail grocer from peddling his wares, while permitting the keeper of an adjoining meat market to peddle perhaps the same articles, or exempt the dealer in plows from the restriction placed on the dealer in paints, fence wire, or any other merchandise, we confess our inability to discover. Under this act, the agent of this appellant's employer and an agent of the keeper of a nearby meat market may start together on the same vehicle, each with his samples—tea, coffee, sugar in one satchel, ham, bacon, cured meats, and lard in the other; may visit the same farmer, in the same vehicle, one take an order for coffee and sugar, the other for lard and bacon. The first is a criminal, the other not. The illustration leaves nothing to be said. It is discrimination between individuals of the same class, not between legitimate classes."

In *City of Janesville* v. *Carpenter, supra* (8 L. R. A., 808), the Court said:

> "Its operation is restricted and partial to that part of Rock River within the County of Rock, while said river elsewhere and all other rivers are excluded. It gives the right

of action to the resident taxpayers of said county while all others are excluded from the exercise of such right, whatever interest they may have in the subject matter of the action. It gives the right of action to the owners or lessees of the right to use the water of said river to operate any mill or factory within said county, and excludes all other owners or lessees of such water powers, by means of said river, elsewhere. It gives to such favored classes the stupendous advantage and exceptional privilege of maintaining such actions without proof that any injury or danger has been or will be caused by reason of such act. It would be difficult, if not impossible, to crowd into so short a statute any more or greater violations of that principle, so essential to a free government, of 'equal, general and standing laws.' For these reasons this Statute is unconstitutional and void. It is not, perhaps, a violation of any special clause of the Constitution in these respects, but it is a violation of its essential spirit, purpose and intent, and contrary to public justice.

Bull v. *Conroe*, 13 Wis. 234;
Durkee v. *Janesville*, 28 Wis. 464;

and cases cited in the opinion."

POINT III.

The practical effect of the Act is to deprive the complainant-appellant and all other persons similarly situated of his and their property and of due process of law in violation of the Fourteenth Amendment.

The record in this case shows that the net result of this legislation is to benefit the large owners of

taxicab companies operating many cars and insurance companies to the detriment of the complainant and all other persons similarly situated. The premium demanded of the taxicab men is $960 per year. His earnings are about $1,820 per year. In this manner he is deprived of his earnings to the extent of $960 per year, which is a virtual confiscation of his earnings.

The right to labor or earn one's livelihood in any legitimate field of industry or business is a right of property, and any unlawful or unreasonable interference with or abridgment of such right is an invasion thereof, and a restriction of the liberty of the citizen as guaranteed by the Constitution.

Lochner v. *New York*, 198 U. S., 45.
Yick Wo v. *Hopkins*, 118 U. S., 356.

No reason is perceived why such onerous burdens should be laid upon the complainant and all others of his class, and why he should be deprived of the means of his livelihood. In view of the discriminatory features of the Act, it is respectfully submitted that the Act is not only unconstitutional by reason of its unequal operation, but because it takes from the complainant his earnings without due process of law, and without good reason therefor.

It is true that the Act also provides for private sureties, but the average taxicab driver, including the complainant, is not so fortunate as to have among the immediate members of his family or among his friends persons who could qualify on such a bond, or who would be willing to risk all they had for the benefit of their relative or friend,

so that in the last analysis they must resort to an insurance policy, and in so doing they must necessarily strip themselves of their means to a livelihood.

When, in addition to that, the discriminatory features of the Act are considered, the Court should have no hesitancy in considering its practical result, and should not hesitate in declaring the law unconstitutional.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the decree of the Court below is erroneous and should be reversed; that the Act in question be held unconstitutional, and that the injunction as prayed for in the bill of complaint should be granted.

Respectfully submitted,

LOUIS J. VORHAUS,
Attorney for Appellant.

LOUIS J. VORHAUS,
ELIJAH N. ZOLINE,
FREDERICK HEMLEY,
of Counsel.

Argued by
JOHN CALDWELL MYERS.

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 126.

WILLIAM HENRY PACKARD,
Appellant,

— against —

JOAB H. BANTON, as District Attorney, in and for the County of New York, and CHARLES D. NEWTON, as Attorney General for the State of New York,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEE JOAB H. BANTON, as District Attorney, etc.

JOHN CALDWELL MYERS,
Solicitor for Appellee Joab H. Banton,
as District Attorney, etc.

JOHN CALDWELL MYERS,
FELIX C. BENVENGA,
Of Counsel.

November, 1923.

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BRIEF FOR APPELLEE JOAB H. BANTON, as District Attorney, etc.

Statement.

This is an appeal from a decree or order of the District Court of the United States for the Southern District of New York, entered on July 17th, 1922, denying a motion for an injunction *pendente lite* and dismissing the bill of complaint for want of equity. (Tr. 10.) The Court was constituted of three Judges, under the provisions of §266 of the Federal Judicial Code.

The Appellant brought a bill in equity to restrain the District Attorney of the County of New York and the Attorney General of the State of New York from enforcing the penal provisions of Chapter 612 of the Laws of 1922 of the State of New York (Highway Law, §282 B).

That statute provides that every firm, association or corporation engaged in the business of carrying or transporting passengers for hire in any motor vehicle—except street cars and motor vehicles operated under a franchise by a corporation subject to the provisions of the Public Service Commission Law—over, upon or along any public street, in a city of the first class, shall deposit and file with the State Tax Commission, for each motor vehicle intended to be so operated, either a personal bond, or a corporate surety bond or a policy of insurance in the sum of $2,500. conditioned for the payment of any judgment recovered against such person, firm, association or corporation for death or for injury to person or property "caused in the operation or the defective construction of such motor vehicle"—such bond or policy of insurance to contain a provision for a continuing liability thereunder, notwithstanding any recovery thereon.

The statute further provides that any person, firm, association or corporation operating a motor vehicle in a city of the first class as to which a bond or policy of insurance is required by the statute, who or which shall operate such vehicle, or cause the same to be operated without such a bond or policy approved by the State Tax Commission, as required by the statute, being on file

with the Tax Commission, shall be guilty of a misdemeanor.

The statute applies only to the operation of motor vehicles in the cities of New York, Buffalo and Rochester, as those are the only cities of the first class.

The injunction against the enforcement of the statute was sought on the alleged ground that the statute is unconstitutional.

It is alleged that the statute makes an arbitrary classification and is unreasonable and unequal in its operation and, therefore, denies equal protection of the law to the appellant and to persons similarly situated—*i. e.*, persons engaged in operating taxicabs for hire in the City of New York; and that it is confiscatory and would deprive appellant of his property without due process of law, in violation of the 14th Amendment to the Constitution of the United States and in contravention of Article 1, §6, of the Constitution of the State of New York.

The District Attorney of New York County, and the Attorney General of the State of New York, were made parties defendants for the purpose of bringing the case within the provisions of §266 of the Federal Judicial Code.

The Bill of Complaint.

The allegations of the appellant's complaint are, in substance, as follows:

1. The jurisdiction of the District Court is invoked under Clause "A", Subdivision 1, of §24 of the Federal Judicial Code, the rights of the plaintiff being predicated upon and arising under the 14th Amendment to the Constitution of the United States, as will hereinafter appear, and the sum and value of the controversy exceeding, exclusive of interest and cost, $3,000.

2. The plaintiff is and has been engaged in the taxicab business, to-wit, carrying and transporting passengers upon and along the public streets in Greater New York for hire, operating 4 cars, and has in all respects complied with the provisions of the city ordinance and the laws of the State of New York regulating the business of taxicabs for hire.

3. The General Assembly of the State of New York has enacted Chapter 612 of the Laws of 1922, entitled "An Act to amend the Highway Law, in requiring indemnity bonds or insurance policies from owners of motor vehicles transporting passengers for hire in cities of the first class;" and the text of the amending statute is set out.

4. The classification made by the statute is arbitrary, unreasonable, and unequal in its operation, and, therefore, denies the plaintiff and all other persons similarly situated the equal protection of the law, in violation of the 14th Amendment of the Constitution of the United States and in contravention of

Article 1, §6, of the Constitution of the State of New York. (The reasons for this contention are averred, but will not be set out here, as they will be discussed in the portion of this brief dealing with the questions of law involved.)

5. The income from the operation of a taxicab in the City of New York is limited by reason of the fact that a rate of fare is fixed by law, and a greater rate cannot be collected. The average net income from the operation of a single taxicab in the city of New York is about $35.00 per week. Since the passage of the statute, the Insurance Companies operating in the State of New York have fixed a rate of premium at $960. for the furnishing of a bond required under the statute, which amounts to about $18.50 per week. The practical result of the administration of the law will be to cut the income of the plaintiff from $35. per week to about $16.50 per week on each car operated by him. Plaintiff, therefore, charges that the law is confiscatory and will deprive him of his property without due process of law, in violation of the 14th Amendment to the Constitution of the United States.

6. The defendants, as the law enforcing officers of the State of New York, intend to enforce the provisions of the statute and have announced that they will prosecute the plaintiff and all other persons similarly situated if the said law is not complied with; and the plaintiff believes defendants will do so unless restrained by an injunction.

7. The plaintiff is without an adequate remedy at law.

The prayer for relief is that the statute be declared unconstitutional and that the defendants be restrained and enjoined from enforcing the statute against the plaintiff and all other persons similarly situated.

The Motion to Dismiss.

The defendant, Joab H. Banton, as District Attorney, etc., made a motion to dismiss the Bill of Complaint for the following reasons and upon the following grounds:

1. That no sufficient facts are averred in the bill of complaint to show that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.

2. That it appears upon the face of the bill of complaint that the facts stated therein are insufficient to constitute a cause of action in equity.

3. That it appears upon the face of the bill of complaint that the plaintiff has a plain, adequate and complete remedy at law.

4. That it does not appear upon the face of the bill of complaint and no sufficient facts are averred therein to show that the intervention of a court of equity or the assumption of jurisdiction by such a court is necessary or essential in order effectually to protect the property or rights of property of the complaint from great and irreparable injury or from any injury whatsoever.

5. That Chapter 612 of the Laws of 1922 is a valid statute duly passed by the Legislature of the State of New York in the due exercise of its lawful and constitutional powers; and it does not appear from the face of the bill of complaint or from the facts averred therein that the said statute, or the enforcement thereof by the State of

New York by and through its governmental and administrative agencies, operates or will operate to deprive or deny the complainant of the equal protection of the laws, or to deprive him of liberty or of any property or rights of property without due process of law.

6. That it appears upon the face of the bill of complaint that to grant the relief sought by the complaint would constitute an unlawful and unconstitutional interference by the agencies of the Federal Government with the lawful and constitutional power, right and duty of the State of New York and its governmental agencies (including the District Attorney of the County of New York) to prosecute violations of a criminal statute of the State of New York.

7. That it appears upon the face of the bill of complaint that this court [The District Court of the United States for the Southern District of New York] is without power or authority to grant the relief or to render the judgment and decree prayed for.

8. That no sufficient facts are alleged in the bill of complaint to warrant or justify the granting of the relief prayed for or any other equitable relief.

The Statute.

The statute under consideration reads as follows:

Chapter 612.

AN ACT

To amend the highway law, in requiring indemnity bonds or insurance policies from owners of motor vehicles transporting passengers for hire in the cities of the first class.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter thirty of the laws of nineteen hundred and nine, entitled "An Act relating to highways, constituting chapter twenty-five of the consolidated laws," is hereby amended by inserting therein a new section, to be section two hundred and eighty-two-b, to read as follows:

§282-b. Indemnity bonds or insurance policies of the first class. Every person, firm, association or corporation engaged in the business of carrying or transporting passengers for hire in any motor vehicle, except street cars, and motor vehicles operated under a franchise by a corporation subject to the provisions of the public service commission law over, upon or along any public street in a city of the first class shall deposit and file with the state tax commission for each motor vehicle intended to be so operated, either a personal

bond, with at least two sureties approved by the state tax commission, a corporate surety bond or a policy of insurance in a solvent and responsible company authorized to do business in the state, approved by the state tax commission, in the sum of two thousand five hundred dollars, conditioned for the payment of any judgment recovered against such person, firm, association or corporation for death or for injury to persons or property caused in the operation or the defective construction of such motor vehicle. Such bond or policy of insurance shall contain a provision for a continuing liability thereunder notwithstanding any recovery thereon. If at any time, in the judgment of the state tax commission, such bond or policy is not sufficient for any cause, the commission may require the owner of such motor vehicle to replace such bond or policy with another approved by the commission. Upon the acceptance of a bond or policy, pursuant to this section, the state tax commission shall issue to the owner of such motor vehicle a certificate describing such vehicle and that the owner thereof has filed a bond, or policy, as the case may be, required by this section. Either a personal or corporate surety upon a bond filed pursuant to this section or an insurance company whose policy has been so filed, may file a notice in the office of the state tax commission that upon the expiration of twenty days from such filing such surety will cease to be liable upon such bond, or in the case of such insurance company, that upon the expiration of such time such policy will be canceled. The state tax commission shall thereupon notify the owner of such motor vehicle of the filing of such notice, and unless such owner shall file a new bond or policy of an insurance company, as provided by this section, within such

time as shall be specified by the state tax commission, such owner shall cease to operate or cause such motor vehicle to be operated, in such city, and the registration of such motor vehicle shall be automatically revoked. Any person, firm, association or corporation, operating a motor vehicle in a city of the first class, as to which a bond or policy of insurance is required by this section who or which shall operate such vehicle, or cause the same to be operated, which such a bond or policy, approved by the state tax commission as required by this section, is not on file with the tax commission, shall be guilty of a misdemeanor.

§2. This act shall take effect July first, nineteen hundred and twenty-two.

POINT I.

It is not sufficiently shown that the amount in controversy exceeds $3,000.

The bill of complaint alleges (Tr. 2) that the jurisdiction of this court is invoked under Clause A, subdivision 1, of §24 of the Federal Judicial Code. This being so, two things must concur in order to give the District Court jurisdiction; namely, (1) there must be a question arising under the Constitution or laws of the United States, and (2) the matter in controversy must exceed, exclusive of interest and costs, the sum or value of $3,000. (*Marcus Brown Holding Co.* v. *Pollak*, 272 Fed. 137).

The paragraph of the bill of complaint numbered "First" (Tr. 2) alleges the bare conclusion that the sum or value in controversy exceeds, exclusive of interest and costs, $3,000. The only facts alleged to show the amount in controversy are set out in the paragraph of the bill of complaint numbered "Fifth" (Tr. 5), which paragraph reads as follows:

> "Fifth: Your orator further avers that the income from the operation of a motor vehicle, such as a taxicab, in the City of New York, is limited by reason of the fact that a rate of fare is fixed by law and a greater rate cannot be collected; that the average net income from the operation of a single taxicab in the City of New York is about $35.00 per week; that since the passage of said Act, the insurance companies operating in the State of New York have fixed a rate of premium at $960.00 for the furnishing of a bond required under said Act, which amounts to about $18.50 per week. Accordingly, your orator avers that the practical result of the administration of said law will be to cut the income of your orator from $35.00 per week to about $16.50 per week on each car operated by him, and your orator therefore charges that the law is confiscatory and will deprive your orator of his property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States."

We submit that the foregoing allegations are wholly insufficient to show that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000 and, therefore, are insufficient to confer jurisdiction upon the District Court to entertain the suit. It will be ob-

served that it is merely alleged that the insurance companies operating in the State of New York have fixed a premium of $960—apparently an annual premium—for the furnishing of the bond required under the statute. There is no allegation as to the premium or cost of *a policy of insurance.*

The statute gives the owners of motor vehicles covered by the law the option of three methods of securing the payment of judgments recovered for death or injury caused by the operation or the defective construction of the vehicles; namely, (1) a personal bond, (2) a corporate surety bond and (3) a policy of insurance of a solvent and responsible company authorized to do business in the State of New York. The complainant alleges the cost to him of adopting one of these methods —the furnishing of a corporate surety bond. There is no allegation showing the cost of a policy of insurance and there is no allegation that the plaintiff cannot furnish the personal bond permitted by the statute.

It is true that in an affidavit verified on June 22nd, 1922, and served upon the defendant Banton after he had served his motion to dismiss the complaint, the plaintiff states that he has neither friends nor relatives who would be able or willing to qualify as individual bondsmen.

Even though affidavits verified and served after the verification and service of the bill of complaint can be resorted to for the purpose of supplying omissions or defects in the allegations in the bill, the affidavit of June 22nd, 1922, is still insufficient, for the reason that it does not allege the

cost of obtaining the policy of insurance permitted by the statute. That cost might be considerably less than the alleged cost of $960 per year for a corporate surety bond. Indeed, it appears from affidavits submitted in behalf of defendants that insurance may be obtained for $540 per year (Tr. 27); and that corporate surety bonds may be obtained at rates ranging from $5 to $25 per car per month, depending upon the amount of collateral deposited with the surety company (Tr. 23, 24).

Furthermore, there is no allegation as to the amount which the plaintiff, in the absence of the statute requiring the giving of a bond or the taking out of a policy of insurance, has set aside in the past or would set aside in the future as a reserve for the purpose of satisfying judgments which might be recovered against him because of injuries arising out of the operation of his taxicabs. Sound business policy requires that a person conducting a business such as the plaintiff's should anticipate the possibility, if not the probability, of the occurrence of accidents in the operation of his taxicabs, and that he should provide for this contingency by setting aside a fund annually which should be used for the purpose of satisfying proper claims against him for injuries inflicted. The amount which the plaintiff might reasonably be expected to be compelled to pay each year in satisfaction of legitimate claims against him should be deducted from the alleged amount of the annual premium for the corporate surety bond, in order to ascertain the real amount involved—the amount in controversy being merely the additional expense, if any, devolved upon the plaintiff by reason of the operation of the statute.

We submit that while the dismissal in the District Court was for want of equity, the bill could have been dismissed for want of jurisdiction, and that therefore the decree of dismissal should be affirmed, without regard to whether the statute attacked in the suit is valid.

POINT II.

The appellant has a plain, adequate and complete remedy at law.

We take it to be a self-evident proposition that a court of equity will not enjoin the enforcement of a criminal statute unless it is clearly shown that the complainant is entitled to relief by injunction. And we take it to be equally self-evident that a Federal court will not interfere with the enforcement by a State of a criminal statute which the State has enacted for the protection of its own citizens, unless a case is made out which convinces the court that it is its duty so to interfere.

This Court has said:

> "Courts are reluctant to interfere with the laws of a state or with the tribunals constituted to enforce them. Doubts will not be resolved against the law, nor the decision of its tribunal prevented or anticipated unless the necessity for either be demonstrated." *Grand Trunk R. R. Co.* v. *Michigan R. R. Commission*, 231 U. S. 457, 465-466.

In *Ex parte Young* (209 U. S. 123, 166, 167, the Court said:

> "No injunction ought to be granted unless in a case reasonably free from doubt. We think such a rule is, and will be, followed by the judges of the Federal courts."

In *Cruikshank* v. *Bidwell* (176 U. S. 73, 80), it was said:

> "It is settled that the mere fact that a law is unconstitutional does not entitle a party to relief by injunction against the proceedings in compliance therewith but it must appear that he has no adequate remedy by the ordinary processes of law or that the case falls under some recognized head of equity jurisdiction."

In *Cavanaugh* v. *Looney* (248 U. S. 453, 456), the Court said:

> "But no such injunction 'ought to be granted unless in a case reasonably free from doubt,' and when necessary to prevent great and irreparable injury. Ex parte Young, supra, 166. The jurisdiction should be exercised only where intervention is essential in order to protect property rights against injuries otherwise irremediable."

The complainant must show that the statute is unconstitutional, that the injunction is essential to the safeguarding of property rights (*Truax* v. *Raich*, 239 U. S. 33-38), and that a plain, adequate and complete remedy may not be had at law (*Judicial Code* 267).

The statute as to adequate remedy "certainly means something; and if only declaratory of what

was always the law, it must at least have been intended to emphasize the rule, and to impress it upon the attention of the courts."

Cruickshank v. *Bidwell*, 176 U. S. 73, 81, quoting *New York Guaranty Co.* v. *Memphis Water Co.*, 107 U. S. 205, 214.

If we assume, for the sake of argument, that Chapter 612 of the Laws of 1922 is violative of the Constitution of the United States, we submit that the complainant is not entitled to an injunction against the defendant Joab H. Banton, as District Attorney, etc., for the reason that he has a plain, adequate and complete remedy at law. In the event that any criminal proceedings are instituted against the complainant for his violation of the statute in question, he may test the constitutionality of the statute, either by suing out a writ of habeas corpus, or by setting up the unconstitutionality of the statute as a defense to the criminal proceedings; and if the State courts uphold the statute, the case may be brought to this Court by writ of error. The question is a simple one; namely, whether the statute is a valid exercise of the State's police power. This question can be tried and determined as easily and as fully in a criminal prosecution as in an equity suit. It is a question of law, pure and simple, and does not involve an inquiry into any questions of fact. It is wholly unlike an inquiry into the reasonableness of rates for a public service corporation that have been fixed by statute, which inquiry would involve complicated questions of fact.

As a matter of fact, the course suggested above has been followed in another case. In *People* v. *Martin* the defendant was convicted, in the Court of Special Sessions of the City of New York, of a violation of the statute. On appeal, the statute was held constitutional and the judgment of conviction was affirmed (203 N. Y. App. Div. 423; 235 N. Y. 550).

The case at bar is clearly distinguishable from the case of *Ex parte Young*, 209 U. S. 123. In the *Young* case it was held that the question of whether a State statute was unconstitutional because the penalties for its violation were so enormous that persons affected thereby were prevented from resorting to the courts for the purpose of determining the validity of the statute and were thereby denied the equal protection of the law, and their property rendered liable to be taken without due process of law, was a Federal question and gave the Circuit Court jurisdiction. It was further held in that case that no adequate remedy at law, sufficient to prevent a court of equity from acting, existed in a case where the enforcement of an unconstitutional State rate statute required the complainant to carry merchandise at confiscatory rates if it complied with the statute and subjected it to excessive penalties in case it did not comply therewith and its validity was finally sustained. In the course of its opinion in the *Young* case, the Court said, at pages 147, 148:

> "Ordinarily a law creating offenses in the nature of misdemeanors or felonies relates to a subject over which the jurisdiction of the legislature is complete in any event. In the

> case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state), and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts, is in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation and over which the jurisdiction of the Legislature is complete in any event."

Chapter 612 of the Laws of 1922 relates to a subject over which the jurisdiction of the Legislature is complete in any event. The subject is the protection of life and limb of the people of the State of New York. The statute is not confiscatory and does not do irreparable injury to the persons affected thereby; and no injunction is necessary to safeguard property rights.

The bill of complaint alleges that the defendants have announced that they will prosecute the plaintiff and all persons similarly situated if the law is not complied with.

Since no answer has been interposed by the defendant, Joab H. Banton, but merely a motion to dismiss the bill of complaint, the allegations just quoted must, of course, for the purpose of this argument, be taken to be true.

The statute under consideration has not been construed in any reported decision in respect to the number of prosecutions which may be maintained against a given person for his failure to comply with the requirements of the statute. We think it probable, however, that the proper construction of the statute is that if a prosecution is instituted for a failure or refusal extending over a number of days, weeks or months, there can be a conviction only as for a single offense, but that if the owner of a taxicab, after conviction for a violation of the statute, wilfully persists in continuing to refuse to furnish the bond or other security required by the statute, the prior conviction will not bar any other prosecutions for subsequent wilful violations of the statute.

But we submit that it makes little difference in the case at bar whether the offense created by the statute is a continuing one, for which there can be only one prosecution, or whether each separate refusal is a separate and distinct offense, for which a separate and distinct prosecution will lie. No matter which construction of the statute is proper, there does not exist that danger of a multiplicity of prosecutions which would justify a court of equity in granting an injunction against the enforcement of the statute. In the case of a public service corporation whose rates are fixed by a penal statute, there is danger of a multiplic-

ity of prosecutions arising out of transactions between the corporation and innumerable persons—between the corporation and the public at large. In the case at bar the only danger to which the complainant is subjected is that of prosecution on account of its refusal to furnish a bond or security to a single entity, namely, the State of New York. The statute does not impose any specific duty upon the complainant in respect to individual members of the public.

Where a penal statute fixes the rates of a public service corporation, the corporation, if it is to continue in business, must either render service for the reduced statutory rates, which may be in fact confiscatory, or must demand higher rates in violation of the law and thereby run the risk of incurring penalties in innumerable cases, which, when accumulated, will amount to the taking of the corporation's property without due process of law (See *Ex parte Young*, 209 U. S. 123, 162).

The situation is entirely different in the case at bar. The statute makes a violation of its provisions a misdemeanor, but does not prescribe the punishment. The *New York Penal Law* (§1937) provides that the punishment for a misdemeanor, for which no other punishment is specially prescribed, is imprisonment for not more than one year or a fine of not more than $500, or both such imprisonment and fine. The penal liability which the plaintiff in the case at bar would incur if he violated the statute under consideration is not *enormous* within the meaning of the rule laid down in *Ex parte Young* (209 U. S. 123).

In *Rast* v. *Van Deman* (240 U. S. 342), the Court passed upon the validity of a statute of the State of Florida requiring merchants in certain designated classes to pay prescribed license taxes and providing that any person violating any of the provisions of the statute should, on conviction, be punished by a fine not exceeding $1,000, or by imprisonment in the county jail not exceeding six months. In the course of its opinion, the Court said (p. 368):

> "The contention that the statute intimidates against a contest of its legality by the severity of its penalties and is therefore unconstitutional on that ground within the ruling in *Ex parte Young*, 209 U. S. 123, is not justified."

The case at bar is clearly distinguishable from *Ex parte Young*. The situation in this case is analogous to that in *Rast* v. *Van Deman* (240 U. S. 342).

Another distinction between the case at bar and the *Young* case is that in this case the question of whether the statute is constitutional is merely one of law, namely, whether it is a valid exercise of the police power of the State of New York; whereas, in the *Young* case the validity of the statute depended upon the reasonableness of the rates fixed by the statute, and that question could not be tried out as fully and as fairly in a criminal prosecution as in an equitable proceeding.

In *Ex parte Young*, 209 U. S. 123, 164, 165, the Court said:

> "It would not be wonderful if, under such circumstances, there would not be a crowd of

agents offering to disobey the law. The wonder would be that a single agent should be found ready to take the risk.

"If, however, one should be found and the prosecutor should elect to proceed against him, the defense that the act was invalid, because the rates established by it were too low, would require a long and difficult examination of quite complicated facts upon which the validity of the act depended. Such investigation it would be almost impossible to make before a jury, as such body could not intelligently pass upon the matter. Questions of the cost of transportation of passengers and freight, the net earnings of the road, the separation of the cost and earnings, within the State from those arising beyond its boundaries, all depending upon the testimony of experts and the examination of figures relating to these subjects, as well, possibly, as the expenses attending the building and proper cost of the road, would necessarily form the chief matter of inquiry, and intelligent answers could only be given after a careful and prolonged examination of the whole evidence, and the making of calculations based thereon. All material evidence having been taken upon these issues, it has been held that it ought to be referred to the most competent and reliable master to make all needed computations and to find therefrom the necessary facts upon which a judgment might be rendered that might be reviewed by this court. *Chicago &c. Railway Co.* v. *Tompkins*, 176 U. S. 167. From all these considerations it is plain that this is not a proper suit for investigation by a jury. Suits for penalties, or indictment or other criminal proceedings for a violation of the act, would therefore furnish no reasonable or adequate opportunity for the presentation of a defense founded upon the assertion that

the rates were too low and therefore the act invalid.

"We do not say the company could not interpose this defense in an action to recover penalties or upon the trial of an indictment (*St. Louis etc. Ry. Co.* v. *Gill*, 156 U. S. 649), but the facility of proving it in either case falls so far below that which would obtain in a court of equity that comparison is scarcely possible."

In *Raich* v. *Truax*, 219 Fed. 273, 283, the Court said:

"We think the position taken by respondents that the institution of a criminal proceeding against the respondent Truax in the State Courts will afford ample means of determining judicially the rights of the complainant in the case at bar is untenable. The complainant is not a party to any such criminal proceedings, nor can he be made a party thereto; nor can he be heard therein, nor can he be in any legal sense secure, or require that his legal rights be determined therein. If he cannot secure his legal rights in a court of equity, he cannot secure them at all; for he is powerless to secure them in any legal proceedings that have been or can be instituted under this law, and he cannot secure them in any action at law for damages. It cannot be successfully contended that he has no legal rights. It is axiomatic that every man within the territorial jurisdiction is entitled to his day in court. This complainant can have no day in court, save in a Court of Equity."

In *Marcus Brown Holding Co.* v. *Feldman*, (269 Fed. Rep. 306, affirmed 256, 170), it was held that "though, ordinarily, equity will not enjoin prose-

cution for violation of statutes alleged to be unconstitutional, but will permit that defense to be interposed in a prosecution, it can issue such injunction to restrain prosecution under the *New York Housing Laws of 1920* (Laws 1920, c. 951), if they are invalid, since thereunder the landlord's agents and employes can be prosecuted for failure to furnish service to tenants, which would affect the landlord's property rights without his having an opportunity to be heard."

In the case at bar, the plaintiff is not in the position in which the plaintiff was in either the case of *Raich* v. *Truax*, or the case of *Marcus Brown Holding Co.* v. *Feldman*, as this plaintiff *would* be a party to a criminal prosecution instituted for his violation of the statute, and his property rights could not be affected without his having an opportunity to be heard. The penal provisions of the statute are applicable only to the owner of the motor vehicle. The statute imposes no duty upon the agents or servants of the owner and makes no provision for the punishment of such agents or servants.

We respectfully submit that the plaintiff in the case at bar has a plain, adequate and complete remedy at law and, therefore, is not entitled to injunctive relief.

POINT III.

Chapter 612 of the Laws of New York of 1922 is a valid exercise of the State's Police Power.

We shall not waste the time of the Court by indulging in a lengthy discussion of elementary principles. This Court is thoroughly familiar with the principles which it has laid down governing the determination of the question of whether the statute under consideration is a valid exercise of the State's police power. What we have to say shall be said briefly and without unnecessary elaboration.

It cannot be doubted that the Legislature of the State of New York has power to regulate the manner in which the business of operating motor vehicles to carry passengers for hire shall be conducted within the State. Reasonable regulations which are designed to protect the public safety, and which are adapted to that end, may be imposed.

Since the Legislature has power to regulate the business of operating taxicabs for hire, the only question to be determined is whether the statute under consideration constitutes a proper exercise of that power. The Appellant attacks the constitutionality of the statute on several grounds which we shall consider briefly.

Appellant asserts that the statute is unconstitutional both because it is violative of

> the 14th Amendment of the Constitution of the United States, and because it is in contravention of Article 1, §6, of the Constitution of the State of New York.

We shall discuss the former contention only. Where a court is constituted under Section 266 of the *Judicial Code* for the purpose of hearing a suit for an injunction to restrain the enforcement of a state statute on the ground that the statute violates the Constitution of the United States, that question alone gives the court jurisdiction, and the court should not consider objections to the validity of the statute based on grounds not connected with the Federal question (see *Jackson* v. *Cravens*, 235 Fed. 212).

We may say at this point that the statute involved in the case at bar has been held constitutional by the courts of the State of New York.

> *People* v. *Martin*, 203 N. Y. App. Div. 423, affirmed without opinion, 235 N. Y. 550.

(*a*) *Equal protection of the law.*

The appellant contends that the statute violates the Fourteenth Amendment to the Federal Constitution in that it denies him the equal protection of the law. The basis of this contention is that the statute singles out persons, firms, associations and corporations engaged in the business of carrying and transporting passengers for hire in motor vehicles on or in public streets in certain cities of the State, and exempts from the operation of the statute owners of cars using the same

as common carriers of goods, and owners of pleasure vehicles and of auto trucks, and also exempts from its operation street cars and motor vehicles operated by corporations under the supervision of the Public Service Commission of the State of New York. In other words, it is contended, in substance, that the Legislature has made a classification which is so arbitrary and unreasonable as to render the statute repugnant to the equal protection clause of the Fourteenth Amendment.

It seems to us that this contention is wholly without merit. The Legislature, when regulating the conduct of a business in the exercise of its police power, has a wide discretion in respect to the selection and classification of the business to be regulated. In the absence of a clear showing to the contrary, it must be assumed that the Legislature, in adopting the particular classification, had information in its possession which justified the action taken. Where the classification operates equally upon all persons coming within the class selected, the courts are extremely reluctant to substitute their judgment for that of the Legislature as to the wisdom or justice of the classification.

We may assume, for the purpose of this argument, that when the Legislature was considering the enactment of the statute involved in this case, it had convincing information of the existence of facts rendering it necessary and desirable to require the owners of taxicabs to give proper security to insure the payment of judgments which might be recovered against them for personal injuries—as, for example, that many taxicabs are

owned and operated by persons who are financially irresponsible; that there are many outstanding judgments rendered against taxicab owners which are uncollectible; that many taxicabs are being operated in a reckless manner and without due regard to the safety either of the passengers or of other persons using the streets; that the competition for business is so keen that the natural tendency is for a taxicab chauffeur to operate his machine in such a manner that unnecessary risks are taken and will continue to be taken, unless legislative restrictions are imposed which will bring taxicab owners to a sense of their responsibility to the public for the negligent operation of the taxicabs; and that the number of deaths and other injuries caused by the operation of taxicabs is very much greater proportionately than the number of deaths and injuries caused by the operation of other motor vehicles.

If the Legislature did have such facts or such information in its possession, it surely had abundant justification for enacting the statute under consideration. The owners of taxicabs should surely be required to place themselves in a position where they are able to respond in damages for injuries caused by their vehicles. The requirement that they should be able to respond in the sum of $2,500 in any given case is a most reasonable one.

This Court has laid down the following rules for testing the contention that a State statute is arbitrary in its classification and consequently denies the equal protection of the law to those whom it affects:

"The rules by which this contention must be tested, as is shown by repeated decisions of this Court, are these:

"(1) The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is arbitrary.

"(2) A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.

"(3) When the classification in such a law is called in question, if any state of facts can reasonably be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

"(4) One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

> *Lindley* v. *National Carbonic Gas Co.*, 220 U. S. 61, 78, 79, *affirming* 170 Fed. Rep. 1023.

"A State may classify with reference to the evil to be prevented, and * * * if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have

shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named."

Patsone v. *Pennsylvania*, 232 U. S. 138, 144.

The State may direct its law against what it deems the evil as it actually exists, without covering the whole field of possible abuses. When a statute has been passed for the purpose of correcting a particular evil, the courts are very slow to declare that the Legislature was wrong in the facts upon which it acted in passing the statute.

Patsone v. *Pennsylvania*, 232 U. S. 138, 144.

Tested by the foregoing rules, it seems to be clear that §282-b of the New York Highway Law (Laws of 1922, c. 612) does not deny the defendant-appellant the equal protection of the law.

(b) *Limitation to Cities of the First Class.*

The statute is not rendered invalid by the fact that it is by its terms applicable only to the operation of taxicabs in cities of the first class.

It is well settled that the equality contemplated by the Fourteenth Amendment does not include a territorial equality, and that legislation which, though limited in the sphere of its operation, affects alike all persons similarly situated within such sphere, is valid.

Barbier v. *Connolly*, 113 U. S. 27, 32;

Hayes v. *Missouri*, 120 U. S. 68;
Tenement House Dept. v. *Moeschen*, 175 N. Y. 325, Affirmed without opinion in 203 U. S. 583;
People ex rel. Armstrong v. *Warden*, 183 N. Y. 223, 226;
Williams v. *People*, 24 N. Y. 405;
Matter of Morgan, 114 N. Y. App. Div. 45, 54;
Burnham v. *Acton*, 35 How. Pr. (N. Y.) 48.

In *Hayes* v. *Missouri*, 120 U. S. 68-71, this Court said *per* Mr. Justice Field:—

> "The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privilege conferred and in the liabilities imposed."

In *People ex rel. Armstrong* v. *Warden*, 183 N. Y. 223, 226, the Court said:—

> "Criminal laws are not necessarily unconstitutional even though they bear unequally upon persons in different parts of the state. The evil which the legislature may have in view in passing such laws may exist only in the great cities of the state, and have no existence in rural districts."

There may be reasons for a taxicab bonding law in large cities which do not apply elsewhere; and

of that the legislature is the best, and practically the final, arbiter.

Certainly it is a matter of common knowledge that the traffic problem in New York City, for example, is a much more serious and complicated one than is the problem in smaller and less congested communities in other parts of the State of New York.

(c) *Due Process of Law.*

The Appellant contends that the statute violates the due process clause of the Fourteenth Amendment to the Federal Constitution.

It is argued that the record in this case shows that the net result of the legislation under consideration is "to benefit the large owners of taxicab companies operating many cars, and insurance companies to the detriment of the complainant and all other persons similarly situated"; that the premium demanded of the taxicab men is $960. per year; that Appellant's earnings are about $1820. per year; and that in this manner Appellant "is deprived of his earnings to the extent of $960. a year, which is a virtual confiscation of his earnings."

A complete answer to the Appellant's argument in this respect may be found in the opinion of the Court in *People* v. *Martin*, 203 N. Y. App. Div. 423, wherein the Court said at pages 429-430:

> "The fact that the exercise of the police power of the State, or the passage of remedial statutes in the public interest, may entail expense upon the owner of property, even

> though it may amount to more than he thinks he can temporarily stand, still is no answer to the validity of the law. The question was sharply presented in the Tenement House cases (Health Department *v.* Rector, etc., 145 N. Y. 32; Tenement House Department *v.* Moeschen, 179 id. 325; affd., 203 U. S. 583), and the right to pass proper statutes upheld, even if compliance therewith be expensive."

Furthermore, the Appellant's argument in respect to the deprivation of his property without due process is based upon the assumption that it will cost him $960.00 to comply with the requirements of the statute. As we have shown in Point I of this brief, it might be possible for the Appellant to comply with the law at a much smaller cost than $960.00 per year. It is not the fact that it would cost him $960.00 to give a corporate surety bond, as such a bond may be obtained at a cost of from $5 to $25 per month (Tr. 23, 24); and the law permits the Appellant to obtain a policy of insurance as an alternative to a corporate surety bond, and the record shows that $540 is the annual cost of obtaining such a policy of insurance (Tr. 27).

It is clearly within the power of the legislature to protect persons using the city Streets by requiring owners of taxicabs to take suitable steps to meet claims for damages for personal injuries caused by the operation of the taxicabs. The Legislature may do this even though compliance with the law will put taxicab owners to considerable expense. It is true that the rates of fares which taxicabs charge are fixed by law; but the statute under consideration does not in any way

regulate, or purport to regulate, the rates of fare. If the cost of complying with this statute is so great as to make it just and equitable that higher rates of fare be permitted, taxicab owners have their recourse by applying to the proper authorities for permission to increase their rates.

The rule is well settled that the inhibition upon the deprivation of liberty or property without due process of law is not violated by the legitimate exercise of legislative power to secure the public safety. The statute under consideration is not an arbitrary interference with the rights of the individual, but is a fair, reasonable and appropriate exercise of the police power. The object sought is the preservation of public safety and the welfare of the community; and the regulations imposed are reasonable and appropriate.

> *McIntosh* v. *Johnson*, 211 N. Y. 265-268; *City of Rochester* v. *West*, 164 N. Y. 410.

> "Laws and regulations of a police nature, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbance. They do not appropriate private property for public use; but simply regulate its use and enjoyment by the owner. If he suffer injury it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure."
>
> *Health Department* v. *Rector, etc.*, 145 N. Y., 32-43.

See also

Matter of Viemeister, 179 N. Y. 235-238;
People ex rel. Nechamcus v. *Warden*, 144 N. Y. 529.

POINT IV.

Similar statutes have been held valid in jurisdictions other than New York.

Statutes and ordinances substantially similar to the New York statute have been upheld in a number of other jurisdictions, as will be seen by the citations hereinafter set out.

Arkansas:

In *Willis* v. *City of Fort Smith* (121 Ark. 606; 182 S. W. 275), it was held that a municipal ordinance regulating jitney busses and requiring the filing of a bond in the penal sum of $2,500 for each jitney was not invalid as discriminatory class legislation or as denying equal protection of the laws.

California:

In *Ex parte Cardinal* (170 Cal. 519; 150 Pac. 348; L. R. A. 1915 F. 850), it was held that a city ordinance regulating jitney busses and providing that the owner must give a bond or furnish a policy of insurance in the sum of $10,000 was reasonable and that the ordinance was valid. The court also held that the ordinance was not ren-

dered invalid by a provision requiring the bond to be that of a surety company. It will be observed that the New York statute is more liberal than the ordinance construed in the *Cardinal* case, in that it permits the giving of a bond with personal sureties as well as a bond with corporate surety.

In the *Cardinal* case the Court said (150 Pac., pp. 348-349):

> "The first substantial objection made to the ordinance is that no proper basis can be found for an attempt to specially regulate the use of the kind of vehicle defined as a jitney bus; that the attempt here to regulate the use of the jitney bus in the manner prescribed, without including all other motor vehicles used on the streets, and especially those used for the carriage of passengers, is a discrimination against the so-called jitney bus that is not warranted under the constitution. It cannot successfully be disputed that the city and county of San Francisco has the right, in the exercise of its police power, to enact such reasonable regulations for the safety of the public as are not in conflict with general laws, to regulate the use of vehicles on its public streets. While in doing this it may not arbitrarily discriminate against any species of vehicle, it may classify vehicles for the purpose of regulation in such manner as is reasonable, in view of the character and manner of use and the danger to the public to be apprehended, and such classification must be upheld by the courts unless it is manifestly unreasonable or arbitrary. No reasonable person will dispute the proposition, that in view of many circumstances peculiar to automobiles and their use, regulations specially applicable thereto will be sustained. And it is manifest that as to automobiles

there may be circumstances existing, by reason of the manner and character of their use on the streets, that will warrant, in the interest of the safety of the public, special regulations as to those used for a particular purpose and in a particular way. The only limitation in the matter of any such classification is that the same must be reasonable—that there is some difference between the vehicles embraced in the class attempted to be created, and other vehicles, that bears a proper relation to the regulations prescribed for those coming within the class. If the classification is reasonable, including all that may fairly be said to be similarly situated and affecting alike all of those, there is no forbidden discrimination. The question of classification is primarily one for the legislative power, to be determined by it in the light of its knowledge of all the circumstances and requirements, the presumption in the courts is in favor of the fairness and correctness of the determination by the legislative department, and the courts are not privileged to overturn that determination unless they can plainly see that the same was without warrant in the facts. This is but a statement of well-settled doctrines applicable in considering such questions as the one before us."

Georgia:

In *Hazleton* v. *City of Atlanta* (144 Ga. 775; 87 S. E. 1043; 93 S. E. 202), it was held that a city ordinance regulating the licensing and operation of jitney busses and requiring the giving of an indemnity bond in the sum of $5,000 for each vehicle so operated was valid, and that the ordinance was not discriminatory against persons engaged in the business of operating such vehicles and in

favor of other persons operating taxicabs and like vehicles.

Iowa:

In *Huston* v. *City of Des Moines* (176 Iowa 455; 156 N. W. 883), the Court upheld the validity of a municipal ordinance which, among other things, required operators of jitney busses to furnish indemnity bonds in the sum of $2,000 for the protection of the public and passengers. The ordinance had been passed pursuant to power conferred by a State statute authorizing municipalities to regulate jitney busses. The court held that the statute was not invalid as class legislation or as taking property without due process of law, and that the ordinance was not invalid as requiring a bond in a prohibitive amount. In that case, one of the contentions was that the ordinance was discriminatory because it did not apply to taxicabs; but the court brushed that contention aside as having no merit.

Louisiana:

In *City of New Orleans* v. *Le Blanc* (139 La. 113; 71 So. 248), the validity of an ordinance which had been adopted by the City of New Orleans was upheld. The ordinance provided, among other things, for the filing of an indemnity bond in the sum of $5,000, and further provided that in the event the amount of the bond should be reduced by the payment of damages for injuries inflicted, an additional bond should be furnished "so that, at all times, a bond, or bonds, of indemnity for the entire sum of $5,000 shall be carried, on each

and every vehicle used, employed and operated in the business aforesaid".

In *Lutz* v. *City of New Orleans* (235 Fed. 978), the United States District Court for the Eastern District of Louisiana upheld the validity of the same ordinance, holding that it did not deny equal protection of the laws, was not confiscatory, and did not deny liberty of contract.

In one respect the ordinance of the City of New Orleans is more burdensome than the New York statute in its provisions. The ordinance requires that the bond shall be executed by a surety company or companies duly authorized to do business in the State of Louisiana, whereas our statute permits the giving of a bond with personal sureties.

Massachusetts:

In *Com.* v. *Slocum* (230 Mass. 180; 119 N. E. 687), the Court upheld a city ordinance requiring the giving of a bond for $1,000 for each motor vehicle used in the transportation of passengers for hire.

And in *Com.* v. *Theberge* (231 Mass. 386; 121 N. E. 30), the validity of a similar ordinance requiring a bond of $2,500 was upheld.

Michigan:

In *Melconian* v. *City of Grand Rapids,* 188 N. W. 521, the Supreme Court of Michigan upheld the validity of an ordinance requiring the furnishing of an indemnity bond in the sum of $5,000.

Nevada:

In *Ex parte Counts* (39 Nev. 61; 153 Pac. 93), it was held that a city ordinance was valid which required the giving of a surety company bond or policy of insurance in the sum of $10,000 for the operation of not to exceed one jitney bus and $5,000 for each additional jitney bus.

New Jersey:

In *West* v. *City of Asbury Park* (89 N. J. L. 402; 99 Atl. 190), the Court upheld the validity of a statute, and of a municipal ordinance enacted thereunder, requiring the owner of a jitney to file an insurance policy in the sum of $5,000.

See also

Gillard v. *Mfgrs.' Casualty Ins. Co.*, 92 N. J. L. 141; 104 Atl. 707.

Tennessee:

In *City of Memphis* v. *State ex rel. Ryals* (133 Tenn. 83; 179 S. W. 631; L. R. A. 1916 B. 151), the Court upheld a statute regulating the operation of jitney busses and requiring, among other things, the execution of a bond in the sum of $5,000 for each car operated. It was held that the statute did not violate the due process clause of either the Federal or the state constitution, and that it did not make an unreasonable classification by discriminating between jitney busses and street railroad cars.

The same statute was construed and upheld in *Nolan* v. *Reichman* (225 Fed. 812) by three Fed-

eral judges sitting in the District Court for the Western District of Tennessee under the provision of §266 of the Judicial Code.

Texas:

In *Ex parte Sullivan* (Tex. Crim. App., 178 S. W. 537), the court held that an ordinance of the city of Fort Worth regulating the operation of jitney busses was valid. The ordinance construed in that case provided, among other things, that no motor bus could be operated until the owner or licensee had taken out an insurance policy to indemnify his legal liability in the sum of $5,000 to any one person other than a passenger, and $10,000 for any single accident where more than one person other than a passenger was injured or killed. The ordinance also provided that if in any event the said policy of insurance should for any reason be cancelled or retired, it should be unlawful to continue the operation of the motor bus until another such bond should have been filed.

In *Auto Transit Co.* v. *City of Fort Worth* (Tex. Civ. App., 182 S. W. 685), the same ordinance was again upheld. The court, after overruling contentions that the ordinance was discriminatory and denied due process of law, held further that the fact that persons operating jitneys were not in a position to comply with the requirement for a bond and would therefore be compelled to abandon the operation of their motor busses did not, of itself, establish the unreasonableness or invalidity of the ordinance.

In *Greene* v. *City of San Antonio* (Tex. Civ. App., 178 S. W. 6), the validity of a city ordinance

requiring the giving of an indemnity bond by one conducting a jitney business was upheld. The reported opinion does not set out the terms of the statute or indicate just what bond was required by the ordinance.

In *Craddock* v. *City of San Antonio* (Tex. Civ. App., 198 S. W. 634), another ordinance of the same city regulating the operation of automobiles used for hire, other than jitneys, and apparently requiring the giving of an indemnity bond, was likewise held to be constitutional. But the opinion in that case does not show what bond was required by the ordinance.

See also, *Ex parte Parr* (82 Tex. Crim. 525; 200 S. W. 404), wherein the court upheld still another ordinance of the City of San Antonio licensing the operation of automobiles for hire and requiring that an operator should furnish a bond or indemnity insurance in the sum of $10,000 against injuries to persons or property through the negligent operation of the automobile.

In the *Parr* case, the court took the view that it was not an improper classification to provide in one ordinance for the licensing of jitneys operating over particular routes and in another ordinance for the licensing of cars for hire confined to no particular route. It was also held that where a city has authority to pass reasonable regulations governing automobiles operating on its streets for hire, the court would not be authorized to declare the regulations unreasonable unless it clearly appeared that they were so.

In *Ex parte Bogle* (Tex. Crim. App., 179 S. W. 1193), an ordinance of the City of Austin was up-

held. The ordinance required the owner operating a jitney to file an indemnity bond of $5,000, conditioned that he should pay any judgment rendered against him to the extent of $2,500 for injury to or death to any person and to the extent of $5,000 for like injuries in one accident to more than one person.

In *City of Dallas* v. *Gill* (Tex. Civ. App., 199 S. W. 1144), an ordinance regulating and licensing jitney busses and requiring a surety bond by the operators was held to be valid. The reported opinion does not disclose the precise terms of the ordinance with respect to the bond required.

Washington:

A statute of the State of Washington regulating the operation of motor vehicles engaged in the business of transporting passengers for hire and requiring a bond in the penal sum of $2,500 with a surety company licensed to do business within the state as surety has been construed in several cases, and in each case held to be valid.

In *State* v. *Seattle Taxicab and Transfer Co.* (90 Wash. 416; 156 Pac. 837), it was held that the statute was not unconstitutional as taking property without due process of law or as discriminating in favor of street railway companies. And it was also held that the statute was not rendered invalid by the fact that it required a surety company bond, with no provision for any other bond.

The case just cited was followed and approved in *State* v. *Ferry Line Auto Bus Co.* (93 Wash. 614; 161 Pac. 467).

In *Hadfield* v. *Lundin* (98 Wash. 657; 168 Pac. 516, Ann. Cas. 1918, C. 492), the court reconsidered the question of the validity of the statute, and after full reconsideration reaffirmed its validity.

West Virginia:

In *Ex parte Dickey* (76 W. Va. 576; 85 S. E. 781), a city ordinance regulating jitney busses was held to be valid. The ordinance required a bond in the sum of $5,000. One of the objections raised to the ordinance was that it discriminated in favor of other distinct classes of vehicles kept for hire.

In two jurisdictions ordinances of this character have been held invalid.

In *Jitney Bus Association of Wilkes-Barre* v. *City of Wilkes-Barre* (256 Pa. St. 462; 100 Atl. 954), the court construed an ordinance which had been adopted by the City of Wilkes-Barre. In that case, the Jitney Bus Association filed a bill to enjoin the enforcement of the ordinance. The Court of Common Pleas dismissed the bill, and plaintiff appealed. The Supreme Court of Pennsylvania modified and affirmed the decree of the lower court. The ordinance construed in that case made it unlawful for any person to drive or operate a jitney automobile unless he had filed with the City Council, either a bond in the sum of $2,500, or a policy of insurance. As to the bond, it was provided that "said bond shall be a continuing liability, notwithstanding any recovery thereon." As to the policy of insurance, it was provided that "said policy of insurance * * * be in limits of five thousand dollars ($5,000) for any one person injured or killed, and subject to such limits for each

person, a total of ten thousand dollars ($10,000) in the case of any one accident resulting in bodily injury or death to more than one person." The ordinance did not provide, as is provided in the New York statute, for the alternative of giving a personal bond.

The Supreme Court of Pennsylvania held that the exclusion of personal sureties was not justifiable or reasonable; and also held that if the provision for a continuing liability meant that after recovery of the penal sum of $2,500 the obligors should continue to be liable for other and additional amounts without limit, then the requirement was clearly unreasonable, as "no surety could properly be asked to undertake such an indefinite and unlimited responsibility." The Court, therefore, modified the decree dismissing the bill by striking from the terms of the ordinance the requirement restricting the surety upon the bonds to surety companies and the requirement that "the bonds shall be a continuing liability, notwithstanding recovery thereon"; and as thus modified affirmed the decree dismissing the bill. In all respects the ordinance was held to be valid except in the particulars just pointed out; and the court expressly recognized the right of the municipality to regulate, in the interest of the public safety, the running of jitneys as well as all other traffic upon the public streets.

It will be observed that there is an important distinction between the statute under consideration and the ordinance which was construed in *Jitney Bus Association* v. *City of Wilkes-Barre*. The Wilkes-Barre ordinance did not give the op-

erator of the motor vehicle the alternative of furnishing a bond with personal surety, whereas the New York statute provides that the operator may furnish "either a personal bond, with at least two sureties approved by the State Tax Commission," or "a corporate surety bond." It is true that the Pennsylvania court condemned the provision of a continuing liability under the bond, but it gave as its reason for so doing that "no surety could properly be asked to undertake such an indefinite and unlimited responsibility."

In the case at bar it is not contended that the provision of the statute for a bond with a continuing liability is invalid.

The New York Statute permits the owner to file a policy of insurance as an alternative for giving either a personal or corporate bond; and the testimony in the case (Tr. 27) shows clearly that certain insurance companies are prepared to issue unlimited policies of liability insurance. So that even if it be conceded for the sake of argument that the appellant in the case at bar could not secure a bond, it is clear that he had facilities for complying with the law by giving the policy of insurance which the statute says would satisfy its requirements.

In *State ex rel. Stephenson* v. *Dillon* (Fla. 1921; 89 So. Rep. 558), the Supreme Court of Florida construed an ordinance of the City of Miami entitled "An ordinance regulating jitney busses." In that case a person who was held in custody by the police under a charge of violating the ordinance by operating a jitney bus without a license, sued out a writ of *habeas corpus*. It ap-

peared that the charter of the city authorized it to enact ordinances for the licensing and regulation of motor busses, jitney busses and other vehicles, and "to pass all ordinances necessary to the health, convenience, comfort, and safety of the citizens". The court held on the authority of *Jitney Bus Assn.* v. *Wilkes-Barre* that an ordinance which requires owners or operators of jitney busses to enter into a bond in the penal sum of $5,000 and which provides that such bond "shall contain a provision that there is a continuing liability thereunder of not less than the full amount thereof * * * notwithstanding any recovery thereon", is an unreasonable requirement and not within the scope of the authority conferred by the city charter. The Miami ordinance provided for either a bond or a policy. It is not clear from the reported opinion whether the operator of a jitney bus had the option under the ordinance of giving a bond with personal surety.

The Pennsylvania and Florida decisions are opposed to the overwhelming weight of authority, and seem to us to be unsound in principle.

We respectfully submit that Chap. 612 of the Laws of 1922—§282-b of the Highway Law—is in every respect valid. The classification adopted by the Legislature was one which it had the power to make. The Legislature had the right to limit the statute to taxicabs carrying passengers for hire, and to limit it to those taxicabs operating in cities of the first class. The provisions for a bond or policy of insurance are reasonable and proper; and the statute is a valid exercise of the State's police power to protect the life and limb of its citizens.

Conclusion.

We feel that we cannot conclude this brief in any better way than by giving the following quotation from the opinion of Chief Judge Hiscock of the New York Court of Appeals in *Matter of Stubbe* v. *Adamson*, 220 N. Y. 459, 469, 670, which seems to us to summarize fairly the views not only of that Court, but also of this Court:

> "The Legislature is justified in guarding against evils both real and fairly to be anticipated by any legislation which reasonably tends to prevent them, and it has a wide discretion in formulating the means which shall be adopted to this end. It is a sufficient basis for legislative action if only there are reasonable grounds for belief that the evil may occur, and even though there be 'an earnest conflict of serious opinion on the subject.'
>
> There must be a real evil, reasonably to be anticipated and to be guarded against, and if it appears from the face of the statute interpreted in the light of common knowledge that there is no evil or that there is no reasonable relation between the evil and the proposed remedy, or that the latter is unduly oppressive and confiscatory, the courts may pronounce the legislation unconstitutional and restrain its enforcement (*People* v. *Charles Schweinler Press*, 214 N. Y. 395, 406, 407).
>
> But if these facts do not appear upon the face of the statute we are bound to assume that the legislature has investigated the subject concerning which it is legislating and has acted with reason and not from caprice. We must start out with the presumption that

> the legislation is constitutional and valid, and however the courts may doubt the wisdom of an enactment they cannot pronounce the same unconstitutional unless able to see either that their is no real, substantial evil of public interest to be guarded against, or that there is no reasonable relation between the evil and the purported cure or prevention offered by the statute (*People* v. *Griswold*, 213 N. Y. 92, 97; *People* v. *Charles Schweinler Press*, *supra*)."

The statute under consideration is a constitutional one. The decree of the District Court denying an injunction and dismissing the bill for want of equity was proper and should be affirmed.

Respectfully submitted,

JOHN CALDWELL MYERS,
Solicitor for Appellee, JOAB H. BANTON,
District Attorney in and for
the County of New York.

JOHN CALDWELL MYERS,
FELIX C. BENVENGA,

Of Counsel.

Dated, New York City, November, 1923.

SUBJECT INDEX.

ALPHABETICAL TABLE OF CASES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

WILLIAM HENRY PACKARD,
Appellant,

against

JOAB H. BANTON, District Attorney in and for the County of New York, and CHARLES D. NEWTON, Attorney General of the State of New York,
Appellees.

BRIEF OF THE ALLIED TAXI OWNERS ASSOCIATION *(Amicus Curiae)*.

This brief is filed in behalf of the Allied Taxi Owners Association, an organization representing the owners of in excess of 4,000 motor vehicles of the type within the provisions of the act.

POINT I.

The equal protection of the law to those within the jurisdiction of the State of New York is denied by the statute in question.

The Legislature in the enactment of any measure under the guise of an exercise of the police power, cannot disregard the constitutional provision enjoining the equal protection of the laws to all persons within its jurisdiction. In exercising such power by the passage of an act such as that now in review, having for its ostensible purpose the safety of pedestrians upon the public highways, the Legislature is bound to impose its burdens equally upon all those individuals constituting the class from which the danger sought to be remedied can reasonably be apprehended. It cannot arbitrarily, by legislative fiat or otherwise, impose such burdens merely upon certain individuals composing such class, leaving others, from whom the danger sought to be guarded against may equally be apprehended, untrammelled in the performance of those acts which the Legislature deems to be a source of danger.

It cannot certainly be denied in the circumstances now before the Court, that those individuals, exempted from the operation of this onerous penal statute, are not equally responsible for the existence of the hazard in question. Indeed, it may fairly be argued by a reference to the schedule of casualties included in the record herein, that the very individuals who are exclusively subjected to the burdens of the act in question, have occasioned

a much smaller proportion of casualties than those individuals who are exempt.

The learned Attorney General in the Court below contended at some length, and submitted authority, that the control of the highways by provisions respecting the operation of motor vehicles was a power which the Legislature enjoyed. The appellant does not question the right or authority on the part of the State Legislature to legislate upon this subject. This Court has too frequently enunciated the principles involved to warrant any denial or qualification. Nevertheless, the exercise of such power by the Legislature must itself be observed with relation to certain principles of equality—principles which either are inherently involved in the exercise of the power itself, or involved in the circumscribing provisions of the Constitution.

The respondent in the Court below quoted at some length from the opinion of Chief Judge CULLEN, in *People* v. *Rosenheimer,* 209 N. Y. 115; 35 Ann. Cases 160; 46 L. R. A. (N. S.) 977, upholding the exercise of the power by the Legislature to enact a measure requiring operators of motor vehicles to report to the authorities all casualties occurring in the operation of their vehicles. While it might be argued as a matter of principle, that, as stated by the Court, "The Legislature might prohibit altogether the use of motor vehicles upon the highways or streets of the State," it surely cannot be contended, paraphrasing the language of the Court, that the Legislature might by any arbitrary classification, prohibit the use of certain motor vehicles upon the public highways, permitting others in like case to operate unrestrained. If that act had provided that only motor vehicles operated

upon the public highways for hire in the transportation of passengers shall be required to report to the police officials any casualty in which they might have been involved, and eliminated from this penal provision the large number of motor vehicles of other classes, there is no doubt but that the learned Court of Appeals would have declared the act grossly discriminatory, and as denying to those within its jurisdiction the equal protection of the laws. An examination of the various statutes enacted by the Legislature of the State of New York, regulating the conduct of certain enterprises, i. e., pawnbrokers, auctioneers, insurance agents, liquor vendors, and others, to which the learned Attorney General referred in the Court below, will indicate that these statutes are general in their operation in so far as they were intended to and actually covered all of the individuals engaged in those occupations. Those statutes requiring individuals engaged in certain enterprises vested with a public interest, to furnish a bond or other security, before engaging in the pursuit of their vocations, are also general in their operation, and actually relate to all of the individuals or corporations engaged in such enterprise.

There is nothing in the record herein indicating that the hazard sought to be guarded against by the exercise of the power in question is one specifically attributable to motor vehicles in first-class cities, engaged in the carrying or transportation of passengers for hire, nor can such special application be in any way justified by an examination of the statute itself. We are here concerned with the interpretation and effect of a statute penal in its nature and one to be strictly construed. Were

this appellant to become involved in a common disaster upon the public highways of the City of New York with a vehicle of the class not included within the statute, resulting in damage to person or property, the appellant, under pain of fine or imprisonment, would be required to secure to the injured person his damages through the medium of the bond required, whereas the operator or owner of the motor vehicle equally involved in the occurrence of the casualty, would escape such burdens, and even though his liability may have been equal to that of the appellant, would in no sense be guilty of any crime were the injured one unable to collect any judgment against him.

In short, we maintain that the Legislature, in controlling the highways, should not be permitted to distinguish between persons of the same class when the purposes for which it exercises its power are equally applicable to all. The conduct of the business of operating vehicles for hire is a legitimate occupation, and the danger of casualty to pedestrians on the public highways is not an incident, to the operation of such business alone, but is rather an incident to the operation of all vehicles on the public highways, whether or not engaged in the business in question.

It cannot be urged, as intimated by the respondent, in the Court below, that the act is merely a regulation by the State of a business vested with a public interest. The purpose of the act does not affect the conduct of the plaintiff's business as such, but rather affects the users of the public highways in general without regard to the business upon which they may be engaged. The principle upon which the Legislature may discriminate in the pas-

sage of acts similar to those now before this Court, is set forth in numerous decisions.

In the case of *Soon Hing* v. *Crowley,* 113 U. S., at pp. 708 and 709, the Court said:

> "The specific regulations for one kind of business which may be necessary for the protection of the public can never be the just ground of complaint, because like restrictions are not imposed upon other business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions."

In that case the business in question was deemed to be attended by a peculiar hazard to which other businesses were not incident.

In the case of *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S., at p. 293, the Court said:

> "The clause of the Fourteenth Amendment especially invoked is that which prohibits a state denying to any citizen the equal protection of the laws. What satisfies this equality has not been and probably never can be precisely defined. Generally it has been said that it 'only requires the same means and methods to be applied impartially to all the constituents of a class so that the law shall operate equally and uniformly upon all persons in similar circumstances.'"

Again, Mr. Justice BREWER, in *Gulf, Colorado & Santa Fe Ry.* v. *Ellis,* 165 U. S. 150, 165, after a careful consideration of many cases, said:

> "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection."

As was said in the case of *Lake Shore & Michigan Southern Ry. Co.* v. *Smith,* 173 U. S. 684, the police power must be exercised in subordination to the provisions of the Federal Constitution. If in the assumed exercise of its police power, the Legislature of a State directly and plainly violates a provision of the Constitution of the United States, such legislation would be void. In the last cited case, the defendant in error contended that the act regulating railroads then under review was a mere regulation of the public business, but the Court held that the regulation provided by the Legislature could not be so effected as to convenience a portion of the persons who might use the railroad, while refusing such convenience to others under some other circumstances.

We quote from the opinion in *Louisville & Nashville R. R. Co.* v. *Bosworth,* 230 Fed., at p. 207, modified 37 Supr. Ct. 683:

> "And what is it, then, to deny the equal protection of those laws? It is to refuse to grant or to withhold equal treatment in conferring or securing rights or in imposing or exacting performance of duties. It is to treat differently or to discriminate in so doing. And it may be said to include an inten-

tion, in doing what is done, to treat differently or to discriminate. But, if such is the natural consequence of what is done, it is to be taken that there is an intention to treat differently or to discriminate. One is always held to intend that which is the natural consequence of what he does. The essence of the Fourteenth Amendment, therefore, is to forbid discrimination and to require equal treatment on the part of each department of the state in the exercise of its particular function, and its effect is to empower and to make it incumbent on the Courts, State and Federal, to prevent discrimination and to secure equal treatment."

POINT II.

The Legislature, in exacting from those affected by the statute security for the payment of judgments, has denied to them equal protection of the laws.

We respectfully enlist the consideration of the Court to another phase of this problem, and one which lends itself to supporting the contention of the appellant. The act under review contains no provisions for the regulation of the motor vehicles in question in the sense of imposing requirements for their safe operation, but is solely directed to insuring to plaintiffs in suits against the individuals operating such motor vehicles the collection of any judgment which they may obtain by imposing upon the defendants in such actions the obligation to furnish sufficient sureties. It is in short a penalty imposed upon defendants in cer-

tain classes of litigation to insure the payment of their debts.

This proposition was decided in the case of *Gulf, C. & S. F. R. R. Co.* v. *Ellis,* 165 U. S. 150; 41 L. ed. 666; 17 Supr. Ct. Reporter 255. In that case, the Legislature of the State of Texas had enacted a law providing that if certain claims presented to the railroad company for adjustment and not exceeding $50 were not compromised, and the claimant recover upon such claim, attorneys' fees not in excess of $10 be added to the judgment The railroad company, upon appeal to this Court, raised the point that the statute, with respect to the assessment of attorneys' fees, operated to deprive it of property without due process of law, and denied to it the equal protection of the laws. The exaction in such cases was made only against the railroad companies and in certain cases, including, among others, claims for damage to property.

Mr. Justice BREWER, in writing the opinion of the Court, said:

> "It is simply a statute imposing a penalty upon a railroad corporation for failure to pay certain debts. No individuals are thus punished, and no other corporation. The act singles out a certain class of debtors, and punishes them, when for like delinquencies, it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the Courts as other litigants in like conditions and with like protection."

The Court gave consideration to numerous decisions of the State Courts, holding similar acts unconstitutional.

We quote further from the opinion of Mr. Justice BREWER:

> "It is of course proper that every debtor should pay his debts, and there might be no impropriety in giving to every successful suitor attorneys' fees. Such a provision would bear a reasonable relation to the delinquency of the debtor, and would certainly create no inequality of right or protection. But before such a distinction can be made between debtors, and one be punished for failure to pay debts while another is permitted to become in like manner delinquent without any punishment, there must be some difference in the obligation to pay, some reason why the duty of payment is more important in one instance than in the other.
>
> If it be said that this penalty is cast only upon corporations, that to them special privileges are granted, and therefore upon them special burdens may be imposed, it is a sufficient answer to say that the penalty is not imposed upon all corporations. The burden does not meet with the privilege. Only the railroads of all corporations are selected to bear this penalty. The rule of equality is ignored. * * *
>
> But if the classification is not based upon the idea of a special privilege, can it be sustained upon the basis of the business in which the corporations to be punished are engaged? That such corporations may be classified for some purposes is unquestioned. The business in which they are engaged is of a peculiarly dangerous nature, and the Legislature, in the exercise of its police power, may justly require many things to be done by them in order to secure life and property. * * *
>
> But a mere statute to compel the payment of an indebtedness does not come within the

> scope of police regulations. The hazardous business of railroading carries with it no special necessity for the prompt payment of debts. That is a duty resting upon all debtors, and while in some cases there may be peculiar obligations which may be enforced by penalties, yet nothing of that kind springs from the mere work of railroad transportation."

Certain principles relative to the applicability of the Fourteenth Amendment and applied by Mr. Justice BREWER in the *Ellis* case are equally applicable in the case at bar. The Texas statute imposed the burden upon one litigant, the defendant railroad company, in a certain class of actions. The Legislature of the State of New York, in the statute now under consideration, has placed the burden upon one class of litigants in certain actions. Although the burden in the Texas case is the payment of an additional sum by way of penalty, while the burden imposed by the Legislature of the State of New York is in form a penal provision requiring the filing of the bond in question, the principles involved are the same. In both cases burdens are imposed upon defendants which are not only not imposed upon the plaintiffs in the litigations to which the statutes are confined, but similar burdens are not placed upon all defendants under the same circumstances. In the Texas case the statute imposed a penalty upon the defendant for failure to pay certain debts. In the instant case the statute imposes a penal provision by way of fine or imprisonment for failure to afford surety by way of bond to certain plaintiffs in certain causes of action conditioned upon the payment of certain debts. We will here utilize

the language of Mr Justice BREWER to indicate the applicability of the principles set forth in the *Ellis* case to the case at bar.

No owners or operators of other motor vehicles (i. e., vehicles not engaged in the carrying of passengers for hire) are required to perform the onerous conditions of the act. Others, although in similar circumstances, and although sued for precisely the same cause of action, to wit, damage to person or property, are not required to give bond. The act singles out a certain class of debtors, to wit, owners and operators of those motor vehicles which are engaged in the transportation of passengers for hire and against whom judgment may be obtained for personal or property damage and punishes them for failure to insure to the respective plaintiffs the payment of such judgments, when for like delinquencies it punishes no others. All defendants, owners or operators of all motor vehicles operating for any purpose upon the streets of the State are not treated alike nor equally. The defendants included within the contemplation of the act cannot appeal to the Courts as other litigants under like conditions and for like protection. The statute requires a bond to be furnished to insure the payment of any judgment which may be procured arising out of damage to the plaintiff's person or property. It is apparent that such circumstances would arise in the event of a collision between two motor vehicles. Litigation results in which the owner or operator of a motor vehicle not included within the provisions of the act demands judgment against the defendant operator of a motor vehicle for the transportation of passengers for hire. The latter interposes a coun-

terclaim demanding an affirmative judgment against the plaintiff for precisely the same damage sought to be recovered by the plaintiff arising out of the same circumstances and the result of the same hazard. If such litigation terminate adversely to the defendant, the plaintiff is assured of the payment of his judgment by the provisions of the act, an assurance which the defendant has been compelled to give at some expense and under penalty of punishment for misdemeanor. If the litigation terminates in favor of the defendant awarding to him damages upon his counterclaim upon precisely the same cause of action as alleged by the plaintiff, he has no such assurance for the collection of his judgment. It is not sufficient answer to this contention to say that owners and operators of motor vehicles for the transportation of passengers for hire only bear the burdens of the act when adjudged to be in the wrong, to wit, if the finding of fact is made that they have operated their vehicles negligently. The conclusion is inevitable that they both do not enter the Courts upon equal terms. Those operating motor vehicles for the transportation of passengers for hire must assure to their opponents the collection of the latter's judgments. They have no such assurance of the collection of judgments they may obtain against the others under similar circumstances. It follows, therefore, that in suits to which they are parties defendant, they are discriminated against and are not treated as other defendants under similar circumstances and in similar actions. They do not stand equally before the law. They do not receive its equal protection.

As was said by Mr. Justice BREWER, "It is of course proper that every debtor should pay his

debts," and further following the language of the Court, there might be no impropriety in giving to every successful suitor in actions for personal or property damage against all owners and operators of motor vehicles assurance of the collections of their judgment by the requirement upon all defendants in such cases to file bonds. Before a distinction can be made between debtors constituting the same class, i. e., owners and operators of all motor vehicles, and some of them punished for failure to furnish a surety for the payment of such debts, while others are permitted in like manner to shake the burdens of the act, there must be some difference in the obligation to pay, some reason why the duty to pay is more important in one instance than in another. It cannot be justly said that the obligation by the owner and operator of a motor vehicle for the transportation of passengers for hire to pay the debt, evidenced by judgment against him, is a more important obligation than that of the owner or operator of another motor vehicle also evidenced by a judgment for the same causes. No reasonable exercise of one's imaginative faculties can create any distinction between such debts. It cannot be said that the penalty imposed in the act in question is cast only upon a certain class to whom special privileges are granted and therefore upon them special burdens may be imposed. The special burdens are not imposed upon all to whom such special privileges are granted. The special privilege in question is the use of the public highways for the operation of motor vehicles. The special privilege is not that of operating a business of transporting passengers for hire. The obligation imposed by

the act has absolutely no relation whatsoever to the mere conduct of the business. In short "The burden does not meet with the privilege."

The statute to compel the payment of a judgment in this case does not come solely within the scope of police regulations. The business of operating motor vehicles for the transportation of passengers, which may be construed as a hazardous one, carries with it no special necessity for insuring to judgment creditors the payment of their debts. That is an obligation resting upon all judgment debtors against whom judgments may be obtained for damage to personal property arising out of the negligent operation of any class of motor vehicles upon the public highways. Yet such a debt does not spring from the mere conduct of the business of transporting passengers in motor vehicles for hire.

The opinion of Mr. Justice BREWER in the *Ellis* case has been interpreted in other circumstances, and in cases where different conclusions based upon different facts were found. Such subsequent decisions are collated in the opinion of Mr. Chief Justice TAFT in the case of *Chicago & Northwestern Ry. Co.* v. *Nye Schneider Fowler Co.*, decided November 13, 1922, 67 L. ed. 46. Reference was made to *A. T. & S. F. R. R.* v. *Matthews*, 174 U. S. 96; 43 L. ed. 909; 19 Supr. Ct. Reporter 609, where a statute imposed the payment of the reasonable attorneys' fees upon a defendant railroad company when unsuccessful in an action for damages for fire caused by the negligent operation of the railroad. The Court in upholding the validity of the statute indicated that the act in question was not for the purpose of enforcing the payment of a

debt, but to secure the utmost care on the part of the railroad in the operation of its trains, to prevent the escape of fire from moving locomotives. It was shown that the decision in the *Ellis* case followed the decision of the State Courts with respect to the interpretation of the statute then under review and its purpose. Incidentally, the Court said, page 100:

> "This Court is not concluded by the opinion of the Supreme Court of the State. It forms its own independent judgment as to the scope and purposes of the statute, while, of course, leaning to the interpretation which has been placed upon it by the highest Court of the State" (four Justices dissenting, basing their dissent upon the decision in the *Ellis* case).

In *Seaboard Air Line Ry. Co.* v. *Seegers*, 207 U. S. 73; 52 L. ed. 108; 28 Supr. Ct. Reporter 28, cited in the opinion of Mr. Chief Justice TAFT, the Court again followed the interpretation of the State Court showing that the statute in question was not to penalize a carrier for refusing to pay a claim within a reasonable time, but to bring about a prompt settlement of proper claims, a penalty operating as a deterrent of the carrier in refusing to settle just claims.

In the case of *Atchison, Topeka & Santa Fe R. R.* v. *Vosberg*, 238 U. S. 56; 59 L. ed. 1199; 35 Supr. Ct. Reporter 675, the Court held unconstitutional a statute of the State of Kansas providing for the payment of mutual demurrage charges and imposing upon an unsuccessful railroad litigant, in addition to such demurrage charges, a counsel fee, a charge from which the plaintiff shipper might be exempt. This was held to be an attempted ex-

ercise of the police power by the Legislature, and although the same result was arrived at as in the *Ellis* case, was held to be distinguishable from the circumstances in that case, because the instant statute was not a penalty imposed for the failure to pay a debt. There the Court held that, while attempting a classification by the supposed relation to the object of securing adequate car service, the statute really related to the object of securing adequate prosecution in court of actions respecting car service.

A careful examination of the subsequent citations of the *Ellis* case indicates that certain principles were enunciated by the Court which may here be considered.

Different conclusions arrived at by this Court upon what may appear at first glance to be similar statutes, are based primarily upon the interpretation of the purpose and effect by the respective State Supreme Courts of the acts under consideration. This Court has stated that it will follow the interpretation of the State Courts respecting the scope and purpose of the statute.

Upon that premise, let us therefore inquire into the expression of opinion by the Appellate Division of the Supreme Court, First Department, in the State of New York, in the case of *People* v. *Martin*, 203 App. Div. 423. At page 426, Mr. Justice DOWLING, in writing the opinion of the Court, said:

> "Reasons will at once suggest themselves why it is desirable that the public shall be protected to the extent of being able to recover some amount of damages from the owners of such vehicles (i. e., the vehicles referred to in the statute) * * *. And the

> claim urged by appellant that taxicab owners are unable to pay the charges for premiums on bonds shows that they must be to a large extent unable to respond to any judgments against them for damages caused by their negligence."

Here we have an interpretation by the State Court of the statute in question, by which the learned Court holds quite clearly that the purpose and effect of the statute is to insure to plaintiffs the payment of their judgment debts against those defendants within the scope of the act.

If this Court, in distinguishing the various decisions respecting statutes similar to that under observation in the *Ellis* case, has laid down the rule that, in so far as such statutes are for the purpose of compelling payment of debts by selected debtors, they are unconstitutional. Then, following the interpretation of the State Court that the purpose of the act in question is to insure the payment of damage to a plaintiff—purely and simply a statute requiring the payment of a debt—as such, under the decisions above referred to, the act now under review is unconstitutional.

POINT III.

The statute in respect to the bond required to be furnished by operators of the motor vehicles in question is unreasonable and unconstitutional.

In support of this contention, we respectfully refer to the language of Chief Justice BROWN, in the case of *State ex rel. Stephenson* v. *Dillon*, 69

Southern Reporter 558 and 560 (Fla.). There the Court referred to the provision of the statute then under review, for the filing of a bond providing for "continuing liability":

> "Just what is intended by this language 'continuing liability,' is not very clear. If it means that while the obligors are nominally bound for $5,000, yet after recovery of that amount it shall continue without limit to the number of occasions when liability may accrue, it is not only a nullification of the provision requiring that such bond shall be in the sum of $5,000 but it is unreasonable as it requires a person to provide sureties who will assume an indefinite and unlimited responsibility although nominally bound for only $5,000.
>
> We have no hesitation in saying that we regard this provision as an unreasonable requirement and therefore void."

Similarly, in the case of *Jitney Bus Co. of Wilkes-Barre* v. *The City of Wilkes-Barre*, 256 Pa. 462, Mr. Justice POTTER said:

> "The act requires owners of a jitney to furnish and keep in full force and effect either a bond or policy of insurance in a responsible company, authorized to do business under the laws of the State of Pennsylvania, in the sum of $2,500, conditioned to pay all losses or damage that may result to any person from the negligent operation or defective construction of said jitney automobile. Said bond shall be a continuing liability, notwithstanding any recovery thereon. If at any time the bond is found insufficient for any cause the city counsel may require the party to replace it with another bond.
>
> We are not quite clear as to what is meant

> by the requirement 'the bond shall be a continuing liability notwithstanding any recovery thereon.' If this provision means that while the bond purports to be in the penal sum of $2,500, yet after recovery to that amount the obligors shall continue to be liable for other and additional amounts without limit, then the requirement is clearly unreasonable. No surety could properly be required to take such an indefinite and unlimited responsibility."

The recent decision of the Supreme Court of the State of Illinois in *People* v. *Hastings,* 307 Ill. 92, likewise voided a statute of a similar nature requiring a ten thousand dollar bond with continuing liability. The Court said:

> "It must be conceded that the continuing liability clause in this case renders it practically impossible for any taxicab owner to induce private persons to become voluntary sureties upon such a bond."

The statute, being penal in its nature, will not be upheld if its meaning is doubtful and uncertain, so that it be difficult or impossible to comply with (*People* v. *Briggs,* 193 N. Y. 457).

The judgment should be reversed.

New York City, N. Y., November 12, 1923.

Louis Tyroler

LEFFERT & TYROLER,
KATZ & ROSEN,
Attorneys for Allied Taxi
Owners Association
(*Amicus Curiae*).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922

No. 126

WILLIAM HENRY PACKARD,
Appellant.

vs.

JOAB H. BANTON, District Attorney in and for the County of New York, and CHARLES D. NEWTON, Attorney General of the State of New York,
Appellees.

Brief of Attorney General of New York

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ALBANY
J. B. LYON COMPANY, PRINTERS
1923

SUBJECT INDEX

LIST OF CASES

IN THE

Supreme Court of the United States

OCTOBER TERM 1922

NO. 607

WILLIAM HENRY PACKARD,
Appellant,
against
JOAB H. BANTON, District Attorney in and for the County of New York, and CHARLES D. NEWTON, Attorney General of the State of New York,
Appellees.

Attorney-General's Brief

STATEMENT

This is an application for an injunction during the pendency of an action brought to restrain the enforcement of a State law by the Attorney General and by the District Attorney of New York County. The District Court, Hough, Manton, CJJ. and Augustus N. Hand, DJ. denied a preliminary injunction, without opinion and without hearing the defendants, and the appeal was taken directly here pursuant to Sec. 266 of the Judicial Code.

The undersigned succeeded the defendant, Hon. Charles D. Newton, as Attorney-General of New York, upon January first of this year and

we make the same suggestion for substitution in his place and the same declaration of an intention to enforce the statute as was made upon behalf of the State Comptroller in *Gorham Manufacturing Co.* v. *Wendell*, 261 U. S. 1. Upon the point of local practice discussed there, see *Matter of Tiffany and Co.*, 80 Hun 486, which was not cited in our brief: *People ex rel. Lardner* v. *Carson*, 78 Hun 544.

After the decision of the United States District Court an injunction was sought by one Darnella against the Commissioner of Police of the City of New York and others, for the purpose of restraining the execution of the statute, and this was denied by the Mr. Justice Finch of the Supreme Court. There has been no appeal. *Darnella* v. *Enright et al.* 195 N. Y. Supp. 217. After a fair trial one Martin was convicted of violating the statute in driving a taxicab without a bond or insurance policy. The Supreme Court, Appellate Division, unanimously upheld the conviction, with opinion by Dowling J. This was affirmed without opinion by the Court of Appeals. *People* v. *Martin*, 203 App. Div. 423; 235 N. Y. 550. In the memorandum of Judge Finch, and in the opinion of Judge Dowling, reference was made to the traffic situation which we claim justifies this exercise of the police power. The very same questions were argued and decided favorably to us, as are presented here.

Jurisdiction was laid in the complaint in the case at bar only under the first subdivision of Sec. 24 of the Judicial Code and there is no attempt to rely upon the 14th subdivision. The application is brought on under Sec. 266 of the

Judicial Code. It seems, therefore, that the attack must be upon the statute as it reads and without reference to inequality in enforcement or harshness of administrative practice. *Yick Wo* v. *Hopkins*, 118 U. S. 356. Nor is there any allegation of diversity of citizenship under which claim of general unlawfulness can be taken, or perhaps of unconstitutionality by virtue of the constitution of the State. We do not suggest the possibility that these features may have intervened but we seek only to define the issue as requiring a determination whether or not this statute is unfair upon its face.

Upon the return day of the order to show cause the defendant, Attorney-General, answered admitting his intention to enforce the statute and denying the plaintiff's allegations of mixed law and fact attacking the statute. Affidavits in addition countering the claims of those offered in support of the complaint were handed up. Much we thus offered may be available within the rules of judicial notice, but our purpose in offering the affidavits was, so far as we could, to make part of the record the reasons for the policy of the law and to avoid any question upon appeal as to the existence of these facts. We did not intend, however, to circumscribe the investigation of the Court and we do not regard ourselves barred and limited by such facts justifying the law as may be submitted by affidavit. Certainly conditions in cities of the first class were not technically in evidence before the Legislature. The Court is free to inquire and we have the same liberty to argue for the policy upholding this statute as had the individual legislators who

enacted the law and the Governor who approved it. *Adkins* v. *Children's Hospital,* 261 U. S. 525. The plaintiff may have a burden to substantiate his allegations, but we have no shifting responsibility in this regard — not even in rebuttal. The rules of presumption operate wholly in favor of the law.

HISTORY OF THE STATUTE

The statute is no unconsidered legislative act passed in a moment of excitement. It is modelled upon the legislation of some fourteen other states and was discussed and examined at length by the Legislature and Governor. The bill was introduced by Assemblyman Kaufman on January 24, 1922, and by Senator Tolbert on February 23d. It was first passed as a Senate bill on March 15, after being reported on March 3d, and amended on March 9th. It passed in the Assembly on March 17th and was transmitted to Governor Nathan L. Miller. He had the bill under consideration until April 13th, when he approved it as Chapter 612, adding new section 282-b to the Highway Law, effective July 1, 1922. In the meantime, on March 27, the Governor held a public hearing at the Executive Chamber and heard arguments for and against the bill. Other hearings had been given before the legislative committees.

Prior to the enactment of the statute there is a long history of agitation for the bonding of operators, supported by the former head of the Motor Vehicle Bureau, Secretary of State Hugo; a presentment of the Grand Jury of New York County on October 28, 1920; recommendations of Chief

Magistrate McAdoo, an accumulation of alarming statistics indicating laxness in the operation of public vehicles, coupled with thousands of executions against taxi operators returned unsatisfied; various bills in the Legislature for past years providing a similar regulation. (Affidavits Record, pages 22-29, and Addendum to this Brief).

POINT I

A. REQUIREMENTS OF SUCH SECURITY FROM BUSINESSES AFFECTED WITH A PUBLIC INTEREST ARE AS COMMON AS SECURITY TO KEEP THE PEACE AND HISTORICALLY THE USE OF HIGHWAYS FOR PRIVATE TRAFFIC HAS ALWAYS BEEN SUBJECT TO SPECIAL REGULATION.

B. SUBSTANTIALLY SIMILAR LEGISLATION HAS BEEN UPHELD AGAINST SIMILAR ATTACKS IN THE INFERIOR FEDERAL COURTS AND IN THE COURTS OF LAST RESORT OF SOME EIGHTEEN STATES.

The segregation of cities of the first class for purposes of regulation is common in our law, and the particular regulation is but the extension of a familiar requirement for other occupations. Bonds have been required of those selling liquor, for the benefit of any one injured. These have been upheld, *Black on Intoxicating Liquors*, Sec. 149. The State has stepped in to compel obedience to judicial mandates in instances too numerous almost to compile. Pawnbrokers must

be licensed to secure the public against the pawnbroker's participation in crimes and pawnbrokers must also be bonded to prevent fraud upon their customers who might be " aggrieved by their misconduct " (Secs. 40-42, General Business Law). Private detectives must be licensed, and must also be bonded to secure any person injured " by the wilful, malicious and wrongful act " of the detective (Secs. 70, 73, General Business Law; *Fox* v. *Smith*, 123 A. D. 369). Auctioneers have been licensed and bonded from the earliest times (Sec. 23, General Business Law). Insurance agents must be licensed (Sec. 91, Insurance Law; *Stern* v. *Metropolitan Life Ins. Co.*, 169 A. D. 217). So also must junk dealers (Sec. 60, General Business Law; *City of New York* v. *Vandewater*, 113 A. D. 456), and peddlers (Sec. 30, General Business Law). Commission merchants must be licensed and bonded " to secure the honest accounting to the consignor of the moneys received or due and owing by such Commission Merchant " (Agricultural Law, Sec. 284). Steamship ticket agents must be bonded to insure against " fraud or misrepresentation to any purchaser of such ticket " (Secs. 150-154, General Business Law). Employment agencies must be licensed and bonded (Sec. 177, General Business Law) to pay the damages " occasioned to any person by reason of any misstatement, misrepresentation, fraud or deceit " on the part of the agency (*People ex rel. Armstrong* v. *Warden*, 183 N. Y. 223; *Brazee* v. *Michigan*, 241 U. S. 340).

Therefore, at the outset of our argument we reinforce the ordinary presumptions by a demonstration of care and consideration in formulation

and resort to familiar principles in application.

The occupations of innkeepers, common carriers and a few others were at common law subject to special liabilities that could not justifiably be imposed upon ordinary activities. Elaboration or extension of restrictions to classes heretofore so segregated have not been examined under the same principles as cases where the law first imposes upon a long established industry or occupation special treatment. *Charles Wolfe Packing Co.* v. *Court of Industrial Relations of Kansas decided June 11, 1923.* The case at bar is not to be considered as in *Munn* v. *Illinois*, 94 U. S. 113, where for the first time grain elevators were declared to be vested with a public interest; or where persons selling real estate were subjected to stringent regulation, *Fisher Co.* v. *Woods*, 187 N. Y. 90; or where all dealers in milk were required to be bonded, *People* v. *Beakes Dairy Co.*, 222 N. Y. 416. Chief Judge Cullen, of our Court of Appeals, deals with the two classes of cases in an arresting dictum in *People ex rel. Moskowitz* v. *Jenkins*, 202 N. Y. 53, 59, where he says:

> "It must be always remembered that law, even constitutional law, rests not wholly on principle, but in part on custom and tradition. A tourist from another planet might at first be unable to perceive why a citizen has the inalienable right to raise and possess chickens at all times, and yet can be deprived of that right as to partridges. But if he pursued his historical study of game laws back to the times when a common man ran greater danger of capital punishment for killing a deer than for killing a human being, he

would understand how the distinction came to exist. Chief Judge Ruger in the Schwab case shows that during and even since colonial times the calling of auctioneer had been regarded as a vocation not open to all, but subject to special license and authority."

Not only are automobiles carrying passengers for hire liable to special and peculiar regulation, but the whole subject matter of motor vehicles is classified separately, even where privately operated upon one's own personal business. So, when this Court came first to deal with the question of State laws coupled with licenses and regulations, a marked difference was recognized in relation to such vehicles. Their operation was classified as something not enjoying the same rights and privileges historically as ordinary businesses theretofore unregulated. In *Hendrick* v. *Maryland*, 235 U. S. 610, a unanimous court said that the movement of motor vehicles is attended by *constant and serious dangers* and is *abnormally* destructive of highways. Therefore, regulations to prevent such dangers could be enforced. Further it was said improved highways are a special facility for automobiles and justify not only the exaction of compensation but the imposition of the regulations. Whether the highways are city asphalt pavements or State improved concrete roads, the obligation of the user is ultimately to the State rather than to the municipality in New York State. *People ex rel. etc.* v. *Flagg*, 46 N. Y. 401.

State regulation of this subject was again tested in *Kane* v. *New Jersey*, 242 U. S. 160. The statute complained of there, in one feature was

like that in the case at bar. The New Jersey Law required non-resident owners to designate the Secretary of State as their attorney upon whom process might be served in any action growing out of the operation of an automobile. The regulation was upheld not only to those *moving into* the State, but also those *moving through* it. Therefore, the very complete control of the states over this particular subject has had the favorable scrutiny of this Court.

In its particular application this control has been said to extend to the power to absolutely exclude motor vehicles from the use of public highways. In upholding the constitutionality of the requirement that one after an accident must invite arrest by confessing even a misdeed, Chief Judge Cullen said in *People* v. *Rosenheimer*, 209 N. Y. 115, 35 Ann. Cases, 160; 46 L. R. A. (N. S.) 977:

> "* * * There is one ground upon which, in my opinion, the validity of the statute can be safely placed. *The Legislature might prohibit altogether the use of motor vehicles upon the highways or streets of the state.* It has been so held in *State* v. *Mayo*, 106 Me. 62, 20 Ann. Cas. 512, 75 Atl. 295, 26 L. R. A. (N. S.) 502, and *Commonwealth* v. *Kingsbury*, 199 Mass. 542, 85 N. E. 848, 127 Am. St. Rep. 513. Doubtless the legislature could not prevent citizens from using the highways in the ordinary manner, nor would the mere fact that the machine used for the movement of persons or things along the highway was novel justify its exclusion. But the right to use the highway by any person

must be exercised in a mode consistent with the equal rights of others to use the highway. That the motor vehicle on account of its size and weight, of its great power and of the great speed which it is capable of attaining, creates, unless managed by careful and competent operators, a most serious danger, both to other travelers on the highway and to the occupants of the vehicles themselves, is too clearly a matter of common knowledge to justify discussion. *The fatalities caused by them are so numerous as to permit the legislature, if it deemed it wise, to wholly forbid their use.* (*Otis* v. *Parker*, 187 U. S. 606, 23 S. Ct. 168, 47 U. S. (L. ed.) 323; *People* v. *Persce*, 204 N. Y. 397, 97 N. E. 877.) If the legislature may declare it a crime to use a motor vehicle on the highway under any circumstances, I do not see why it may not equally declare it a crime to so use such a vehicle as to injure any one in person or property. That, in effect, is a diminution, not an increase, of the criminality it had the power to attribute to the use of a motor vehicle. The provision now before us is but a still further diminution of the statutory inhibition the legislature would be authorized to enact. It does not declare it a crime to operate an automobile on the highway or even that in its operation injury to persons or property shall be a crime, *but only that failure by the operator, in case of such injury, to identify himself shall be criminal.* I cannot see why the greater power does not

> include the less. Of course, the whole of this argument rests on the proposition that in operating a motor vehicle the operator exercises a privilege which might be denied him, and not a right, and that in a case of a privilege the legislature may prescribe on what conditions it shall be exercised. This principle was recognized by us in the case of *Ives* v. *South Buffalo R. Co.*, 201 N. Y. 271, Ann. Cas. 1912B 156, 94 N. E. 431, 34 L. R. A. (N. S.) 162. * * * "

If such extreme restrictions applied to all automobiles would comply with the Constitution, does our statute become invalid as soon as it is limited to automobiles carrying passengers for hire?

The argument that such a limitation is unconstitutional is not new, but has been made unsuccessfully in many cases hereafter discussed or cited.

Where an even narrower application of the statute, required a bond or liability insurance for jitneys only, inequality and unconstitutional discrimination has been denied.

Huston v. *City of Des Moines*, 176 Iowa 455; 156 N. W. 883; *City of Memphis* v. *State of Tennessee*, 133 Tenn. 83; 179 S. W. 631; L. R. A. 1916 B. p. 1151; *Ex Parte Cardinal*, 170 Cal. 519; 150 Pa. 348; L. R. A. 1915 F. p. 850; *Dickey* v. *Davis*, 76 W. Va. 576; 85 S. E. 781; L. R. A. 1915 F. p. 840 are illustrative of cases where the court has sought for reasons to support a classification of "jitneys," although street cars and taxicabs were excluded from the requirement of a bond. The reasons given are interesting, but

are of chief importance here as demonstrating that even a more restricted classification may be upheld than we argue for. In the present statute we have a requirement that all motor vehicles "carrying passengers for hire" must be bonded or insured. Street cars and omnibuses are excluded, since both are under the supervision of the Public Service Commission and differ from taxicabs, etc., in essentials.

However, there are cases where the classification has been as broad as in our statute. *Nolen* v. *Riechman*, 225 Fed. 812, was decided by a statutory court of three judges in the Western District of Tennessee. The Court gives the reasons why automobiles operated as common carriers or for hire may be subjected to this special regulation without a like requirement for automobiles privately operated. (P. 819.)

> "It may well have been that the Legislature had in mind, when it enacted the statute in question, that those engaging in the business which the act sought to regulate operated vehicles susceptible of becoming dangerous to the public by the manner of their operation; that they had no fixed track upon which to run, and were at liberty to move over the entire surface of the street; that they had no schedule; that pedestrians had no way of knowing when and where to expect them; that they increased the danger to persons using the street, whether as pedestrians or while boarding or leaving street cars or other vehicles; that they stopped at street crossings, or along the curb between street

crossings to receive and discharge passengers; that very often the driver owns the machine, or at least an equity in it; that many of them are financially irresponsible; that the patrons of such vehicles are composed of men, women and children; that the vehicles in the hands of careless drivers, might rush through crowded streets at a dangerous rate of speed, probably without any financial responsibility to their patrons or others upon whom damage might be inflicted by such machines, because of the negligence of the operators."

The Court then goes on to say that the regulation might constitutionally be confined only to jitneys and not extended to taxicabs; but the opinion is careful to point out at page 820 that it is treating the statute and upholding it as if its restrictions applied to both jitneys and taxicabs.

Therefore, it appears that whether the classification includes or excludes taxicabs, it is neither too broad nor too narrow. This is right upon principle, for the power to make a grand classification is peculiarly legislative. "Legislation to be practical and efficient must regard the special purpose as well as the ultimate purpose." *St. John* v. *New York*, 201 N. Y. 633; as when advertising wagons and busses were excluded from *certain* city streets, *Fifth Ave. Coach Co.* v. *New York*, 221 U. S. 467.

Moreover a statute cannot be proved unconstitutional by thinking up other instances to which it might with equal propriety have been made to apply. (*S. W. Oil Co.* v. *Texas*, 217 U.

S. 114, 121; *Keokee Coke Co.* v. *Taylor*, 234 U. S. 224, 227.)

As is said in *Miller* v. *Wilson*, 236 U. S. 373, 383:

> "It is a well-established principle that the legislature is not bound, in order to support the constitutional validity of its regulation, to extend it to all cases which it might possibly reach. Dealing with practical exigencies, the legislature may be guided by experience. *Patsome* v. *Pennsylvania*, 232 U. S. 138, 144. It is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. As has been said, it may 'proceed cautiously, step by step,' and 'if an evil is specially experienced in a particular branch of business' it is not necessary that the prohibition 'should be couched in all-embracing terms.' *Carrol* v. *Greenwich Insurance Co.*, 199 U. S. 401, 411. If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied."

And in *Keokee Coke Co.* v. *Taylor*, 234 U. S. 224, 227:

> "The suggestion that others besides mining and manufacturing companies may keep shops and pay their workmen with orders on themselves for merchandise is not enough to overthrow a law that must be presented to be deemed by the legislature coextensive with the practical need."

A State, as was said in *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157, 160:

> " may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed.
>
> * * * If a class is deemed to present a conspicuous example of what the legislature seeks to prevent, the Fourteenth Amendment allows it to be dealt with although otherwise and merely logically not distinguishable from others not embraced in the law."

In the cases we shall now discuss in the second subdivision of this point, the reason why motor busses running on fixed routes, express trucks carrying packages instead of human beings and privately operated automobiles in large cities could properly be excluded from the requirement for a bond are in nearly every instance discussed. Of course, the division of legislation by classes of cities is very common in New York. Article 12, Sec. 2 of the State Constitution recognizes this. This we believe will not be much questioned. As was said in *Missouri* v. *Lewis*, 101 U. S. 22, 31:

> " If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its

> doing so. This would not, of itself, within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the laws. If every person residing or being in either portion of the State should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to."

See also *Mallett* v. *North Carolina*, 181 U. S. 589, 598; *Brown* v. *New Jersey*, 175 U. S. 192; *Maxwell* v. *Dow*, 176 U. S. 581; *Chappell Co.* v. *Sulphur Co.*, 172 U. S. 474, 475; *Gardner* v. *Michigan*, 199 U. S. 325, 333. See particularly *Fifth Ave. Coach Co.* v. *City of New York*, 221 U. S. 467, *supra*, where the regulation of vehicles was even limited to *certain* streets in the city.

Ever since the enactment of the Motor Vehicle Law of New York in 1910, there has been made distinction between the licensing of different vehicles. This classification has been constantly growing until differentiation has been made between commercial vehicles, trucks, trailers, omnibuses, station wagons, pleasure cars and light delivery wagons. (Highway Law, Article 11.)

In the very beginning, ordinance power, except in a single instance, was withheld from villages and granted in an increasing measure to cities (Sec. 288, Highway Law). Under the new General Highway Traffic Law, a motorist operating in a large city is subject to numerous and minute regulations from which he is free by mandate of the statute in smaller communities. All operators are required to be licensed in the Greater City; upstate only chauffeurs have to be personally licensed. Highway Law, Sec. 289.

B. The question of the right to require an indemnity bond in principle like that required under the statute in litigation here, has been considered in many cases and we have been unable to find any case where the provision was found unconstitutional. The United States Circuit Court of Appeals, Fifth Circuit, has passed favorably upon the question.

The cases are:

Federal.

Lutz v. *City of New Orleans*, 235 Fed. 978, aff'd. by 5th Circuit, Court of Appeals on opinion below, 237 Fed. 1018.

This was an application before District Judge Foster for a preliminary injunction. The plaintiffs complained of the requirement of a bond for $5,000. The ordinance required that a surety company bond only be given and no surety would execute such a bond without a deposit of $5,000 in cash. The law was held constitutional.

Nolen v. *Richman*, 225 Fed. 812, *supra*.

Shoenfield v. *City of Seattle*, 265 Fed. 727, Western District of Washington. Three judges pursuant to Sec. 266 of the Judicial Code.

Lane v. *Whitaker*, 275 Fed. 476. District Court of Connecticut, Manton, C. J., Thomas and Knox, D. J. J.

These cases recognize the rule of absolute regulation applied to as narrow a class as jitneys.

Massachusetts.

Commonwealth v. *Slocum*, 230 Mass. 180; 119 N. E. 687.
Commonwealth v. *Theberge*, 231 Mass. 386; 121 N. E. 30.

The ordinances pursuant to the statute required a surety bond for $1,000 upon all motor vehicles transporting passengers for hire between fixed and regular termini (jitneys). This was upheld in the first case as reasonable and the second case follows the ruling.

New Jersey.

West v. *City of Asbury Park*, 89 N. J. L. 402; 99 A. 190.
Gilland v. *Manufacturers Casualty Ins. Co.*, 92 N. J. L. 141; 104 A. 707.

The first case had to do with an act requiring an insurance policy of $5,000 from auto bus and jitney operators. Protest was made because taxicabs were not included, but the statute was upheld. The second case follows the West case.

Michigan.

Melconian v. *City of Grand Rapids*, 218 Mich. 397; 188 N. W. 521.
Substantially the same requirement was upheld here.

Wisconsin.

Ehlers v. *Gold*, 169 Wis. 494; 173 N. W. 325.

The statute here applied to all common carrier automobiles on fixed routes and required a bond to pay $2,500 to any one person, or $5,000 in any one accident. The constitutionality of the statute was not attacked. The verdict in favor of the plaintiff was set aside upon other grounds.

Illinois.

People v. *Kastings*, 307 Ill. 92; 138 N. E. 269.

This case followed the New York case of *People* v. *Martin, supra.*

Florida.

State ex rel. Stepherson v. *Dillon*, 82 Fla. 276; 89 So. 558.

The requirements of the ordinance here were as broad as in the statute in the case at bar. A bond or insurance policy of $5,000 was required of all motor vehicles carrying passengers for hire. The ordinance was upheld, but was condemned in so far as the liability on the bond was continuing.

West Virginia.

Dickey v. *Davis*, 76 W. Va. 576; S. E. 781; L. R. A. 1915 F. p. 840 *supra.*

The ordinance here required a bond of $5,000 of jitney operators and was upheld.

California.

Ex Parte Paul Cardinal, 170 Cal. 519; 150 Pac. 348; L. R. A. 1915 F. p. 850, *supra.*

An insurance policy for a maximum liability of $10,000 was required under the ordinance and was upheld.

Tennessee.

City of Memphis v. *State ex rel. Ryals*, 133 Tenn. 83, 179 S. W. 631; L. R. A. 1916 B. p. 1151, *supra*.

This law required a bond of $5,000 for each car operated as a jitney. The Court indicates the difference between the regulation which may be applied to automobiles and farm produce merchants. The statute was upheld.

Iowa.

Huston v. *City of Des Moines*, 176 Iowa 455; 156 N. W. 883.

This law required a bond of $2,000 for jitneys. A discrimination between jitneys on the one hand, and motor busses and taxicabs was held justified.

Pennsylvania.

Jitney Bus Ass'n. v. *City Wilkes-Barre*, 256 Pa. St. 462; 100 A. 954.

This law required a bond of $2,500 of jitneys and there was the same complaint that surety companies would not write the bond required. The Court criticized the lack of an alternative for personal sureties. The statute in the case at bar, of course, permits this alternative.

Georgia.

Hazleton v. *City of Atlanta*, 144 Ga. 775.

A bond of $5,000 for jitneys was required. Taxicabs were not included and the law was upheld. A distinction in favor of taxicabs was upheld.

Louisiana.

La Blanc v. *City of New Orleans,* 138 La. 243 So. 212; on rehearing 139 La. 113.

A law requiring a bond of $5,000 from jitney operators was upheld.

Nevada.

Ex Parte Counts, 39 Nev. 61; 153 Pac. 93.

A bond or insurance of $10,000 for jitneys was upheld.

Arkansas.

Willis v. *City of Ft. Smith,* 121 Ark. 606; 182 S. W. 275.

A bond of $2,500 was required of jitneys and was upheld.

Washington.

Hadfield v. *Lundin,* 98 Wash. 657; 168 Pac. 516, Ann. Cas. 1918 C. p. 942.

This case arose after the Supreme Court had twice held the law constitutional in:

State v. *Seattle Taxicab Co.*, 90 Wash. 416; 156 Pac. 837.
State v. *Ferry Line Auto Bus Co.*, 93 Wash. 614; 161 Pac. 467.

These cases are specially important because of the repeated examination of the question and because the law applied to all transportation for hire in cities of the first class. The law was upheld.

Texas.

Again, we have a jurisdiction where the question was repeatedly examined.

Ex Parte Parr, 826 Texas Crim. App. 525; 200 S. W. 404.
City of Dallas v. *Gill*, 199 S. W. 1144.

Various bonding and regulation provisions were upheld.

Rhode Island.

Providence v. *Lawrence*, 116 At. 664.

Substantially the same requirement was upheld.

Our law is the broadest in its classification of any we find has been enacted. The only carriers which use the streets which are excluded, are

street cars, express trucks and omnibuses operating upon a regular route. The reasons why street railway companies are not required to give a bond are fully set forth in the cases cited *supra*. These reasons apply equally to omnibuses operating under franchises; especially is this true in view of the provisions of Sec. 26 of the Transportation Act of New York, as amended by Laws of 1919, chapter 37, giving local authorities and the Public Service Commission a control and supervision over those not exercised over other types of motor vehicles carrying passengers for hire.

The foregoing having dealt with the claim that there is a denial of the equal protection of the laws, there is left the assertion that there is a taking of property without compensation or, rather, a denial of due process.

II

THE CLAIMS OF COSTLINESS ARE MISTAKEN, OR EVEN IF TRUE, WOULD NOT IMPAIR THE VALIDITY OF THE STATUTE.

The argument we have developed in our foregoing Point I seems to be unassailable by the very weight of authority. The plaintiff must distinguish the instant case from the foregoing, and there is left nothing therefore for him to assert except what is pleaded in the fifth paragraph of his complaint. There, referring to the cost of the bond, his claim is, " This law is unconstitutional

because it requires a man to pay out $960 a year to comply with it!"

Fortunately, such a figure for the cost of compliance cannot be substantiated and is indeed refuted in detail by the affidavits we submitted. We say fortunately, because we are solicitous that the policy of our lawmakers should not have imposed hardship upon the operators or compelled an increase in the cost of the service to the public. Although we may be interested in the policy of the Legislature, it surely does not follow that the court may condemn that policy simply because it may expend itself uneconomically.

The statute offers three methods of compliance:

1. A personal bond.
2. A surety company bond.
3. A policy of insurance.

Even if the stock companies will exact a maximum rate of $960 for taxicabs from certain individuals, for a policy of insurance, this charge does not represent the typical instance, for it covers accidents as well happening outside cities of the first class. We tried ourselves to ascertain what would be the cost of compliance and were confused with figures running all the way from $60 a year for a surety bond or policy of insurance to the maximum stated by the plaintiff. Yet, whatever is the ultimate truth as to the cost of the methods of compliance, there remains always the personal bond, costing nothing, which was provided by the Legislature with a wholesome regard for the operator in small business.

It must be apparent that the men who own and

operate their own cars and who can demonstrate to their neighbors and friends that they are careful, experienced and honest, compose the group of persons which the Legislature must have had in mind and for whose benefit it inserted the provision that the owner of a motor vehicle might file a bond executed by two personal sureties.

On the other hand, the large corporation which operates its taxicabs of necessity by hired agents or chauffeurs who come and go, shifting from month to month, would have no opportunity other than in the exceptional case to ask any one to vouch for their honesty, skill or experience, and to thus become a personal surety upon their bond. Such corporation would therefore on its part naturally look to the insurance company for its insurance policy or bond, which would in turn look to the corporation should it be held liable under the bond executed for the latter.

Curiously enough, in the hearings before the Governor and in the Legislature, the complaints against the law when then proposed, did not come from the larger corporations which would thus resort to surety companies, but from the operators of limited field, like the appellant, for whom the Legislature has provided three means of compliance.

Nevertheless, the appellant complains of the cost of a surety bond or insurance policy when special provision has been made for his case by which he can also obtain his coverage personally through friends.

Three possible methods of compliance have been provided, as we have noted, *i. e.*, a surety company bond, an insurance policy, a personal bond.

All three methods apply to every one the law affects. Variations in the coverage that may be afforded in the market are almost infinite and are argued out at length in our affidavits. Liability insurance has become one of the most common resorts in ordinary business experience. The Legislature has simply compelled persons exercising the *special privilege of trafficking on public highways* to seek a protection upon which the ordinarily prudent man operating a motor vehicle anywhere customarily depends.

Yet the astonishing charge is made that such compulsion is confiscatory. Certainly a strange test of reasonableness is set up, when the expense of a usual practice in business experience is offered as the only criterion.

We think that we have said enough to show that the statute is fair and constitutional upon its face. It is the practical operation of the law which is, nevertheless, still insisted upon by the appellant. Without allegation of sufficient jurisdictional grounds and lacking a proper experience test he argued below as an abstract matter that, although the legislation may be unimpeachable on its face, conditions in the market, which the lawmakers did not foresee, convert the measure into an unconstitutional one.

In the Tenement House cases (*New York Health Dept.* v. *Trinity Church, etc.*, 145 N. Y. 32; *N. Y. Ten. House Dept.* v. *Moeschen*, 179 N. Y. 325; affirmed without opinion, 203 U. S. 583) the claim that the cost of the installation of toilets and water in a tenement house was greater than the property profitably could withstand, was argued and rejected. These cases

illustrate a type upon which appellant doubtless relies for his test of reasonableness. We think he will find no case of compelling authority which decides that the mere cost of an improvement, appliance, device, system or practice impairs a law commanding their installation, where, as here and in the Tenement House cases, the thing ordered done is customary and usual in ordinary business. *Wilmington Mining Co.* v. *Fulton*, 205 U. S. 60; *Noble Bank* v. *Haskell*, 291 U. S. 104; *Reduction Co.* v. *Sanitary Works*, 199 U. S. 306, and *The Tenement House* are all cases upholding the statutes that were attacked upon the ground they were expensive to comply with.

We emphasize that taxicab operation is not like mine operation, the management of a bank, the conduct of a grain elevator or the business of a milk factory. *Kansas Industrial Court Case, supra.* Regulation of these has nearly always been sustained, but limitations upon such regulation may be conceived to exist. No limitation whatever applies to the regulation by the Legislature of the use of city streets. The absolute prohibition of the sale of intoxicants was held not to be forbidden by the restraints upon Congress within its territorial jurisdiction. (*In re Rahrer*, 140 U. S. 545) or by the restraints upon the States (*Foster* v. *Kansas*, 112 U. S. 201). Taxicab drivers, livery keepers and others soliciting business upon the streets are in the same position as licensed dealers in liquors were. Therefore the question of costliness does not properly enter into the definition of a power which may absolutely prohibit. Admitting, as the plaintiff must, that the Legislature can forbid the operation of taxicabs, how can he be granted

the remedy sought here, because, instead of absolute prohibition, regulation may become so burdensome as to work the same lawful and constitutional result.

The court cannot properly say that because compliance may be costly the Legislature could never have intended this result. The purpose of the Legislature to require a surety bond, a personal bond or an insurance policy is perfectly clear and admitted by all.

THE JUDGMENT SHOULD BE AFFIRMED WITH COSTS.

ALBANY, N. Y., *Nov.* 7, 1923.

CARL SHERMAN,
Attorney-General of New York.

EDWARD G. GRIFFIN,
CLAUDE T. DAWES,
Of Counsel.

ADDENDA

THE STATUTE

Chapter 612

AN ACT to amend the highway law, in requiring indemnity bonds or insurance policies from owners of motor vehicles transporting passengers for hire in cities of the first class.

Became a law April 13, 1922, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter thirty of the laws of nineteen hundred and nine, entitled "An act relating to highways, constituting chapter twenty-five of the consolidated laws," is hereby amended by inserting therein a new section, to be section two hundred and eighty-two-b, to read as follows:

§ 282-b. Indemnity bonds or insurance policies in cities of the first class. Every person, firm, association or corporation engaged in the business of carrying or transporting passengers for hire in any motor vehicle, except street cars, and motor vehicles operated under a franchise by a corporation subject to the provisions of the public service commission law over, upon or along any public street in a city of the first class shall deposit and file with the state tax commission for each motor vehicle intended to be so operated, either a personal bond, with at least two sureties

approved by the state tax commission, a corporate surety bond or a policy of insurance in a solvent and responsible company authorized to do business in the state, approved by the state tax commission, in the sum of two thousand five hundred dollars, conditioned for the payment of any judgment recovered against such person, firm, association or corporation for death or for injury to persons or property caused in the operation or the defective construction of such motor vehicle. Such bond or policy of insurance shall contain a provision for a continuing liability thereunder notwithstanding any recovery thereon. If at any time, in the judgment of the state tax commission, such bond or policy is not sufficient for any cause, the commission may require the owner of such motor vehicle to replace such bond or policy with another approved by the commission. Upon the acceptance of a bond or policy, pursuant to this section, the state tax commission shall issue to the owner of such motor vehicle a certificate describing such vehicle and that the owner thereof has filed a bond, or policy, as the case may be, required by this section. Either a personal or corporate surety upon a bond filed pursuant to this section or an insurance company whose policy has been so filed, may file a notice in the office of the state tax commission that upon the expiration of twenty days from such filing such surety will cease to be liable upon such bond, or in the case of such insurance company, that upon the expiration of such time such policy will be canceled. The state tax commission shall thereupon notify the owner of such motor vehicle of the filing of such notice, and

unless such owner shall file a new bond or policy of an insurance company, as provided by this section, within such time as shall be specified by the state tax commission, such owner shall cease to operate or cause such motor vehicle to be operated, in such city, and the registration of such motor vehicle shall be automatically revoked. Any person, firm, association or corporation, operating a motor vehicle in a city of the first class, as to which a bond or policy of insurance is required by this section who or which shall operate such vehicle, or cause the same to be operated, while such a bond or policy, approved by the state tax commission as required by this section, is not on file with the tax commission, shall be guilty of a misdemeanor.

§ 2. This act shall take effect July first, nineteen hundred and twenty-two.

STATE OF NEW YORK,
Office of the Secretary of State. } *ss.:*

I have compared the preceding with the original law on file in this office, and do hereby certify that the same is a correct transcript therefrom and of the whole of said original law.

JOHN J. LYONS,
Secretary of State.

Comparison of Some State Laws Relating to Indemnity Bonds on Motor Vehicles for Hire.

STATE	Kind of vehicle	Amount of bond or surety	Administrative officer	Penalty	Miscellaneous
Connecticut Public Acts 1920–21, p. 3367–68, ch. 341.	Jitney	Basis of $500 per passenger; $5,000–$10,000 for 16 passenger car or less; $20,000 maximum.	Commissioner of vehicles	Fine of $500, imprisonment for one year or both.	Property liability $1,000.
Idaho Statutes 1919, v. 1, p. 665.	Automobile, auto stage, motor truck, motor vehicle or any self-propelled vehicle carrying passengers or freight along a particular line.	$2,000 for 5 or less vehicles; $5,000 for more than 5 vehicles.	Public utilities commission.	As for a misdemeanor	
Illinois Statutes (Smith) 1921, p. 1729–1730.	Motor vehicle in city of 100,000 or more carrying passengers for hire.	$10,000 for each vehicle	Secretary of State	Fine of from $100 to $500 or imprisonment in county jail for 30 days to 1 year or both.	
Iowa Acts 1921, p. 104.	Jitney buses and all motor vehicles engaged in carrying passengers on plan similar to street cars.	$5,000 for car carrying 10 passengers; $10,000 for car carrying more than 10 passengers.	Clerk of district court	$50–$100 or 60 days in county jail.	
Louisiana Constitution and statutes (Wolff), 1920, v. 2, p. 1235.	Service car, i. e., motor vehicles carrying passengers or freight.	$2,000 and an additional $500 for every passenger over four.	Clerk of the police jury.	Fine of $100, 90 days imprisonment or both.	
Massachusetts Gen. Laws, 1921, v. 2, p. 1680–81.	Motor vehicle offering transportation similar to railway.	Fixed by local authorities.	Local licensing authority.	$100 fine, 2 months imprisonment or both.	

COMPARISON OF SOME STATE LAWS RELATING TO INDEMNITY BONDS ON MOTOR VEHICLES FOR HIRE—*Cl'd.*

STATE	Kind of vehicle	Amount of bond or surety	Administrative officer	Penalty	Miscellaneous
New Hampshire Laws 1919, p. 108, ch. 86.	Motor vehicle carrying passengers for hire along a regular route.	$500 for each car and $100 for each passenger carried in it.	Public service commission.	$100 fine.	
New Jersey Acts 1921, p. 638–39, ch. 204.	Jitney or motor vehicle run along a route carrying passengers.	$5,000 for each vehicle...	Chief fiscal officer of the city.	For misdemeanor.	
New York Laws 1922, ch. 612.	All motor vehicles carrying passengers for hire in 1st class cities.	$2,500 for each car	Tax Commission....	For misdemeanor.	
Oregon Gen. laws, 1921, Special, p. 37–38, ch. 10.	Motor vehicles used in transportation of property or passengers.	Fixed by public service commission.	Public service commission.	Maximum fine of $1,000, maximum jail sentence of 1 year or both.	
Rhode Island Laws 1915, 1916, p. 244–47, ch. 1263.	Motor bus running on certain route.	Maximum of $500 per passenger.	Local licensing authority.	$50 fine for each offense.	Permissive.
Tennessee Code 1917, p. 1194–95.	Motor vehicle carrying passengers on plan similar to street railway.	Amount determined by locality but not less than $5,000 for each car.	Clerk of county court.	$50–$100 fine for each offense.	
Washington Laws 1920–1921, p. 341–42, ch. 111.	Motor vehicles operating along a fixed route carrying property or people.	Maximum of $5,000 for compensation to one person, minimum of $10,000 for all persons; $1,000 for property damage.	Public service commission.	For gross misdemeanor.	
Wisconsin Statutes 1921, v. 2, p. 1494–95.	Motor vehicles operating along fixed routes similar to street railways.	Maximum compensation to one person $2,500, for any one accident $5,000.	Railroad commission.	$10–$100 fine for each offense, or 10–90 days in jail.	

IN THE

Supreme Court of the United States

October Term, [illegible]

WILLIAM HENRY PACKARD,

Appellant,

against

JOAB H. BANTON, District Attorney in and for the County of New York, and CHARLES D. NEWTON, Attorney General of the State of New York,

Appellees.

REPLY BRIEF FOR APPELLANT

LOUIS J. VORHAUS,
Attorney for Appellant.

Arthur B. [illegible],
of Counsel.

The [illegible] Press, 57 Warren St., N. Y. [illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM.

WILLIAM HENRY PACKARD, Appellant, against JOAB H. BANTON, as District Attorney of the County of New York, and CHARLES D. NEWTON, Attorney General of the State of New York, Appellees.	No. 126.

APPELLANT'S REPLY BRIEF.

The brief submitted by *amicus curiae* satisfactorily controverts much of the argument submitted in behalf of the appellees. Effort will be made, therefore, to refrain from extensive repetition.

Counsel for the District Attorney contends (page 25 of his brief): "It cannot be doubted that the Legislature of the State of New York has power to regulate the manner in which the business of operating motor vehicles to carry passengers for hire shall be conducted within the State. Reasonable regulations which are designed to protect the public safety and which are adapted to that end

may be imposed." As an assertion of a well-known principle of law this cannot be controverted. But is the present statute such a "regulation"? Assuredly it in no way affects or "regulates" the manner in which the appellant's business is to be conducted. The language of Mr. Justice Brewer in *Gulf, C. & S. F. R. R. Co.* v. *Ellis*, 165 U. S. 150 (cited in the brief of the *amicus curiae*), is here in point:

> "But if the classification is not based upon the idea of special privilege, can it be sustained upon the basis of the business in which the corporations to be punished are engaged? * * * But a mere statute to compel the payment of an indebtedness does not come within the scope of police regulations. The hazardous business of railroading carries with it no special necessity for the prompt payment of debts," etc.

Counsel for the District Attorney would have us assume (p. 27) that the Legislature in adopting this particular classification "had information in its possession which justified the action taken." While there is undoubtedly dicta to this effect in Federal cases cited, it must be assumed that such expressions were given in connection with cases where a reasonable cause for classification was apparent. It is equally obvious that to adopt such an assumption unqualifiedly would entirely foreclose under any circumstances any claim of arbitrary classification.

Mr. Justice Brewer said in the *Ellis* case:

> "While good faith and a knowledge of existing conditions on the part of the legislature is to be presumed, yet to carry that

> presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clause of the 14th Amendment a mere rope of sand in no manner restraining State actions."

Let us, in any event, inquire into the nature of this "convincing information of the existence of facts which rendered it necessary and desirable" to limit the operation of these penal provisions to the appellant and others similarly situated. The learned counsel for the District Attorney asserts (p. 27) that the "information" rendered it "necessary and desirable to require owners of taxicabs to give proper security to insure the payment of judgments which might be recovered against them." He further contends that "many taxicabs are owned and operated by persons who are financially irresponsible." If this be the purpose of the act (as indeed seems to have been held by the State Court in *People* v. *Martin*, 203 App. Div. 403), we may then characterize it as an act for the purpose of compelling the payment of certain debts by a particular class of individuals. As such it comes within the decision of Justice Brewer in the *Ellis* case. This decision has been the subject of citation in subsequent cases before this Court, but we believe the principle laid down above has not been changed.

But, contends the District Attorney, it was the further purpose of the act to "bring taxicab owners to a sense of their responsibility to the public for the negligent operation of their taxicabs." It is difficult to determine any causal relation between

such an assumption and the plain language of the act itself; how such an object can be accomplished in the manner prescribed by the statute is not entirely clear. But when the appellee states (p. 28) that the "number of deaths and other injuries caused by the operation of taxicabs is very much greater proportionately than the number of deaths and injuries caused by the operation of other motor vehicles" he is assuming a state of facts clearly negatived by the statistics before the Court.

The records of the Chief Medical Examiner's office in the City of New York indicate the number of deaths upon the highways of New York City, caused by the operation of motor vehicles to be as follows:

1918	Taxicabs,	24	Other	motor	vehicles,	648
1919	"	23	"	"	"	686
1920	"	26	"	"	"	672
1921	"	53	"	"	"	738

In *People* v. *Martin* (*supra*), proof was received by stipulation that the number of taxicabs was less than 4 per cent. of the total number of motor vehicles using the streets of the City of New York. The Court there stated that the records indicated the ratio of casualties from taxicabs to be in excess of the ratio for other vehicles. But the learned Court failed to note that the taxicab plies its trade upon the streets of New York approximately twenty hours in the day, while it is doubtful whether, upon an average, other motor vehicles operate more than one-tenth of that time.

We fail to note, therefore, any particularly alarming significance in these statistics, justifying the Legislature in arbitrarily legislating against one

group of individuals, and permitting others, constituting 95 per cent. of the same class, and who form collectively a far greater source of danger, to operate unrestrained. Indeed, we doubt whether this was the "information" before the Legislature, justifying the act in question. But if the great evil to be remedied was the existence of unpaid judgments against owners of taxicabs, there are undoubtedly similar judgment debts, and for the same causes, against the owners of other motor vehicles. We here respectfully suggest that it is manifestly impossible to substantiate such a contention by resort to any records or statistics. This is at the most a mere surmise upon the part of the appellees.

The case of *Patsone* v. *Pennsylvania*, 232 U. S. 138, cited by appellees, is, therefore, of no aid to their contention; for there the legislation was directed against "those from whom the evil mainly is to be feared" and the danger was "characteristic of the class named" (p. 144).

The Attorney General in Point I of his brief refers to the various provisions of the New York Consolidated Laws requiring individuals engaged in specified callings, to furnish bonds, usually conditioned upon their compliance with the laws regulating their respective vocations. There exists, however, no analogy to the case at bar:

First: These statutes seek directly to regulate a public business; commission merchants, who are bonded for the purpose of rendering honest accountings, are in this respect regulated directly with respect to their business.

Second: No attempt is made in these statutes to arbitrarily discriminate in favor of part of any particular class and against others forming the same class and doing business under the same circumstances.

Third: The bonds required by the statutes cited are to secure the public against "misrepresentation, fraud and deceit," to secure honest accountings to consignors, against "misconduct or fraud" by pawnbrokers, etc. These bonds are merely sureties to the people of the state that the very requirements necessitating the regulation by license, will be complied with.

It cannot be assumed that the law now under review, requiring less than 5 per cent. of the operators of motor vehicles in New York City, to furnish security for the payment of judgments against them is in any sense a regulation of the business of transporting passengers for hire. The payment of the judgments referred to in the act is not a reasonable incident to the appellant's business. The danger of injury to persons or property is an incident to the general use of the highway in no sense peculiar to the appellant, but generally attributable to users of the highway by operation of all motor vehicles. The primary meaning of the word "regulate" is to "lay down a rule by which a thing shall be done" (*State* v. *Lowry*, 166 Ind. 372).

In *People* v. *Beakes Dairy*, 22 N. Y. 428, cited by the Attorney General, the Court upheld the statute requiring dealers in milk to furnish bonds, as applied to the particular defendant, simply upon the

ground that the Legislature was exercising its reserved power to amend the defendant's corporate charter (p. 433).

Hendrick v. *Maryland*, 235 U. S. 610, is by no means in point. There the purpose of the act was to raise revenue to defray the expense of maintaining the State system of highways; it was general in its scope and related to all motor vehicles. The appellant was not in a position in that case to assert its unconstitutionality.

The decision of this Court in *Kane* v. *New Jersey*, 242 U. S. 160, has no relation to the questions here discussed. The requirement that non-resident automobile owners designate the Secretary of State as a person upon whom process may be served in their behalf, was not a discrimination against them, but rather a requirement putting such non-resident class upon an equality with resident owners.

The reference to *People* v. *Rosenheimer*, 209 N. Y. 115, does not sustain the position of the appellees. The present issue of arbitrary selection or discrimination was not raised. The Court merely applied the familiar principle of State control of highways to the particular facts there disclosed.

The Attorney General refers to decisions sustaining acts of State Legislatures, claimed to be similar to the one at bar, and emphasizes the decision of the Federal District Court for Western Tennessee (*Nolan* v. *Reichman*, 225 Fed. 812). The quotation from the opinion attributes certain characteristics to owners of motor taxicabs, which as a mat-

ter of common knoweldge are equally attributable to owners of all motor vehicles.

It is possible, as contended by the Attorney General (pp. 14-15), that the Legislature is not bound to "cover the whole field of possible abuses." That view has been variously applied, not only with relation to the limitation of the remedies to certain individuals, but to limitation of the nature of the remedies. But we are here concerned with circumstances calling for different conclusions, although possibly not inconsistent with that view. There can be no question of the identity of the persons from whom the danger sought to be guarded against, can be reasonably apprehended. It becomes manifest upon a mere reference to the statute and its objects. If the Legislatures, in the cases cited, had declared the existence of particular evils from the conduct of certain occupations, and then proceeded to apply its remedy to some persons of that particular class, permitting others to continue unrestrained, it is at least questionable whether the Court would have upheld the legislation upon the ground that the Legislatures were not obligated to "cover the whole field of possible abuses."

The question is raised in this Court, by the District Attorney, that the appellant is not entitled to relief by injunction. We believe it now to be fully established that the appellant's right to the relief may be sought in the form now before the Court (see cases cited pp. 16-17 of main brief of appellant). The District Attorney, in contending that the jurisdictional amount of $3,000 is not involved, and citing paragraph Fifth of the bill of complaint, has overlooked the fact that the appel-

lant is the owner of four of the vehicles mentioned in the act in question.

The decree of the District Court should be reversed.

Dated, New York, November 19, 1923.

LOUIS J. VORHAUS
Attorney for Appellant.

AVEL B. SILVERMAN,
of Counsel.

PACKARD *v.* BANTON, AS DISTRICT ATTORNEY IN AND FOR THE COUNTY OF NEW YORK, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 126. Argued January 2, 1924.—Decided February 18, 1924.

1. The amount in controversy in a suit to enjoin enforcement of a statute alleged to be unconstitutional in relation to the plaintiff's business, is the value of his right to carry on the business free from the restraint of the statute. P. 142.
2. When prevention of criminal prosecutions under an unconstitutional statute is essential to protect property rights, equitable jurisdiction exists to restrain them. P. 143.
3. A New York statute requires persons engaged in the business of carrying passengers for hire in motor vehicles, upon public streets, to file security or insurance for payment of judgments for death, or injury to person or property, caused in the operation or by defective construction of such motor vehicles. *Held:*

(*a*) Not in violation of equal protection of the laws, either because it applies only in cities of the first class, or because it does not apply to persons operating motor vehicles for their own private ends, or because it does not apply to street cars and omnibuses, which are regulated under another law. P. 143.

(*b*) Not so burdensome in this case as to amount to confiscation, in violation of due process of law,—in view of the opportunity allowed to file a corporate or personal bond, if the cost of insurance be excessive compared with the returns from plaintiff's business. P. 145.

(*c*) Inability of a party to comply with the statute without assuming an excessive burden does not render the requirement unconstitutional if due to his peculiar circumstances. *Id.*

4. The regulatory power over an activity carried on by government sufferance or permission is greater than over one engaged in by private right. *Id.*

Affirmed.

APPEAL from a decree of the District Court, which dismissed a bill to enjoin enforcement of a New York statute regulating carriers of passengers for hire by motor vehicle.

Mr. Avel B. Silverman, with whom *Mr. Louis J. Vorhaus, Mr. Elijah N. Zoline* and *Mr. Frederick Hemley* were on the briefs, for appellant.

Mr. Carl Sherman, Attorney General of the State of New York, with whom *Mr. Edward G. Griffin* and *Mr. Claude T. Dawes*, Deputy Attorneys General, were on the brief, for the Attorney General of New York, appellee.

Mr. Felix C. Benvenga, with whom *Mr. John Caldwell Myers* was on the brief, for Banton, District Attorney, appellee.

Mr. Louis Tyroler, by leave of Court, filed a brief on behalf of the Allied Taxi Owners Association, as *amicus curiae*.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is a suit to enjoin the enforcement of a statute of New York (Laws, 1922, c. 612, p. 1566) alleged to be in contravention of the equal protection of the laws and due process clauses of the Fourteenth Amendment. The statute requires every person, etc., engaged in the business of carrying passengers for hire in any motor vehicle, except street cars and motor vehicles subject to the Public Service Commission law, upon any public street in a city of the first class, to file with the State Tax Commission, either a personal bond with sureties, a corporate surety bond or a policy of insurance in a solvent and responsible company, in the sum of $2,500, conditioned for the payment of any judgment recovered against such person, etc., for death or injury caused in the operation or [by] the defective construction of such motor vehicle. The bill alleges that the rate of premium for the required policy is fixed by the insurance companies at $960; that the net income from the operation of a motor vehicle is

about $35 a week, which would be reduced by the operation of the law to $16.50 per week, resulting in confiscation of the earnings of appellant for the benefit of the insurance companies. The statute makes it a misdemeanor to operate such motor vehicle without having furnished the required bond or policy; and appellant avers that appellees, as prosecuting officers of the State, have threatened, and, if not enjoined, will proceed to prosecute him, unless he complies with the law. The court below was constituted of three judges, under § 266 of the Judicial Code. Upon the return of the order to show cause a hearing was had, and the court denied a motion for an injunction *pendente lite,* and dismissed the bill for want of equity, without handing down an opinion.

1. Appellees insist that the District Court was without jurisdiction because the matter in controversy does not exceed the value of $3,000. Judicial Code, § 24, subd. 1. The bill discloses that the enforcement of the statute sought to be enjoined will have the effect of materially increasing appellant's expenditures, as well as causing injury to him in other respects. The allegations, in general terms, are that the sum or value in controversy exceeds $3,000, which the affidavits filed in the lower court tend to support; that appellant is the owner of four motor vehicles, the income from which would be reduced, if the law be enforced, to the extent of $18.50 each per week; and that his business would otherwise suffer. The object of the suit is to enjoin the enforcement of the statute, and it is the value of this object thus sought to be gained that determines the amount in dispute. *Mississippi & Missouri R. R. Co.* v. *Ward,* 2 Black, 485; *Texas & Pacific Ry. Co.* v. *Kuteman,* 54 Fed. 547, 552; *Nashville, C. & St. L. Ry. Co.* v. *McConnell,* 82 Fed. 65, 73; *Scott* v. *Donald,* 165 U. S. 107, 114; *City of Hutchinson* v. *Beckham,* 118 Fed. 399, 402; *Evenson* v. *Spaulding,* 150 Fed. 517, 520; *Hunt* v. *New York Cotton Exchange,* 205 U. S. 322, 336.

Counter affidavits were filed, tending to show that the expenses incident to compliance with the statute would be less than alleged; but it sufficiently appears that the value of the right of appellant to carry on his business, freed from the restraint of the statute, exceeds the jurisdictional amount.

2. Another preliminary contention is that the bill cannot be sustained because there is a plain, adequate and complete remedy at law; that is, that the question may be tried and determined as fully in a criminal prosecution under the statute as in a suit in equity. The general rule undoubtedly is that a court of equity is without jurisdiction to restrain criminal proceedings unless they are instituted by a party to a suit already pending before it to try the same right that is in issue there. *In re Sawyer*, 124 U. S. 200, 209–211; *Davis & Farnum Manufacturing Co.* v. *Los Angeles*, 189 U. S. 207, 217.

But it is settled that "a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property." *Truax* v. *Raich*, 239 U. S. 33, 37–38. The question has so recently been considered that we need do no more than cite *Terrace* v. *Thompson*, 263 U. S. 197, where the cases are collected; and state our conclusion that the present suit falls within the exception and not the general rule. *Huston* v. *Des Moines*, 176 Ia. 455, 464; *Dobbins* v. *Los Angeles*, 195 U. S. 223.

3. We come, then, to the question whether the statute assailed contravenes the provisions of the Fourteenth Amendment. That the selection of cities of the first class for the application of the regulations and the exclusion of all others, is not an unreasonable and arbitrary classification does not admit of controversy. *Hayes* v. *Missouri*, 120 U. S. 68. We cannot say that there are not reasons applicable to the streets of large cities—such as

their use by a great number of persons or the density and continuity of traffic—justifying measures to safeguard the public from dangers incident to the operation of motor vehicles which do not obtain in the case of the smaller communities.

The contention most pressed is that the act unreasonably and arbitrarily discriminates against those engaged in operating motor vehicles for hire in favor of persons operating such vehicles for their private ends, and in favor of street cars and motor omnibuses. If the State determines that the use of streets for private purposes in the usual and ordinary manner shall be preferred over their use by common carriers for hire, there is nothing in the Fourteenth Amendment to prevent. The streets belong to the public and are primarily for the use of the public in the ordinary way. Their use for the purposes of gain is special and extraordinary and, generally at least, may be prohibited or conditioned as the legislature deems proper. Neither is there substance in the complaint that street cars and omnibuses are not included in the requirements of the statute. The reason, appearing in the statute itself, for excluding them is that they are regulated by the Public Service Commission laws, and this circumstance, if there were nothing more, would preclude us from saying that their non-inclusion renders the classification so arbitrary as to cause it to be obnoxious to the equal protection clause. Decisions sustaining the validity of legislation like that here involved are numerous and substantially uniform. Among them, we cite the following: *Nolen* v. *Riechman,* 225 Fed. 812, 818; *Schoenfeld* v. *Seattle,* 265 Fed. 726, 730; *Lane* v. *Whitaker,* 275 Fed. 476, 480; *Huston* v. *Des Moines,* 176 Ia. 455, 468; *Memphis* v. *State,* 133 Tenn. 83, 89; *Ex parte Dickey,* 76 W. Va. 576, 578; *Melconian* v. *Grand Rapids,* 218 Mich. 397, 403; *State* v. *Seattle Taxicab & Transfer Co.,* 90 Wash. 416, 423; *Donella* v. *Enright,*

195 N. Y. S. 217; *People* v. *Martin*, 203 App. Div. 423, where the statute now under review was sustained against the attacks here made as to its constitutionality. And see *Fifth Avenue Coach Co.* v. *New York City*, 221 U. S. 467; *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, 353.

It is asserted that the requirements of the statute are so burdensome as to amount to confiscation and, therefore, to result in depriving appellant of his property without due process of law. The allegation is that the rate of premium fixed by insurance companies operating in New York amounts to about $18.50 per week for each taxicab while the net income from each is about $35 per week. The operator, under the statute, however, is not confined to this method of security, but instead may file either a personal bond with two approved sureties or a corporate surety bond. Appellant says that he cannot procure a personal bond, but it does not appear that he might not procure the corporate surety bond at a less cost. Affidavits filed below on behalf of appellees tend to show that insurance policies in mutual casualty companies may be secured for $540 a year; and that operators of upwards of a thousand cars have furnished personal bonds. The fact that, because of circumstances peculiar to him, appellant may be unable to comply with the requirement as to security without assuming a burden greater than that generally borne, or excessive in itself, does not militate against the constitutionality of the statute. Moreover, a distinction must be observed between the regulation of an activity which may be engaged in as a matter of right and one carried on by government sufferance or permission. In the latter case the power to exclude altogether generally includes the lesser power to condition and may justify a degree of regulation not admissible in the former. See *Davis* v. *Massachusetts*, 167 U. S. 43.

Affirmed.